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VOL. 3127
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See also.
Vol. 3126
United States
Court of Appeals
for the Ninth Circuit

NORTHWEST ORIENT AIRLINES, INC.,
Appellant,

vs.

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Appellee.

Transcript of Record

In Three Volumes

VOLUME III.

(Pages 769 to 1165, inclusive).

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

OCT 31 1957

PAUL F. O'BRIEN, CLERK

No. 15670

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(Testimony of Dudley S. Cox.)

The Court: Is the information about Captain Pfaffinger the same type of information as that about Kuhn, or vice versa?

Mr. Koch: Yes, your Honor. I will offer it in evidence.

The Court: Any objection?

Mr. Riley: Yes, your Honor. May I inquire of the witness?

The Court: You may.

Mr. Riley: Mr. Cox, those three pages attached to A-25 are reports made to you subsequent to the date of the crash of Flight 324, isn't that correct?

The Witness: Yes, sir.

Mr. Riley: They were not regular training records compiled in the regular course of airline business as such records are maintained?

The Witness: Sir, this is a summary of such records.

Mr. Riley: These are taken from the records themselves, is that correct?

The Witness: Yes, sir.

Mr. Riley: I object to the exhibit, your Honor, [747] particularly the last three pages, as not being the best evidence. They are self-serving declarations of the corporation made after the date of this accident, and are not the best evidence because they refer or relate to other records which are not before the Court. I should have entertained the same objection as to A-24, and overlooked that.

Mr. Koch: I would like to ask a few questions.

The Court: You may.

(Testimony of Dudley S. Cox.)

Q. Are these prepared in accordance with the regulations of the CAA?

A. Yes, sir. The schooling and records of all pilots and flight personnel are prepared, and a record is kept of their attendance at these classes.

The Court: What about these summaries? Are they made as a part of that requirement? These summaries are something made up for your convenience rather than to answer requirements of the regulation, is that right?

The Witness: Yes, sir, that is right.

Q. Who causes these summaries to be made up?

A. I asked for them.

Q. For what purpose?

A. To assemble all the known facts about the pilot histories and training of both these pilots.

Q. Are these made from records under your supervision and [748] control? A. Yes, sir.

The Court: The objection will have to be sustained.

Mr. Koch: Your Honor, with respect to that, part of this material was included in the pre-trial order, where the only question was with respect to relevancy. We stipulated that the documents were authentic and were records of the company, and now the objection goes to the fact that they are not records of the company. That was the purpose for which the pre-trial order was entered into.

Mr. Riley: I stated they were not the best evidence. I realize they came from the records of the company and Mr. Cox ordered them to be made,

(Testimony of Dudley S. Cox.)

and they come from the company. I state they are not the best evidence.

The Court: It will have to be sustained. These cannot take the place of original records.

Mr. Koch: The first page did not fall in that category, your Honor.

The Court: The ruling stands. The objection is sustained.

Mr. Koch: May the exhibit be separated?

The Court: Certainly, if there is a part of it you think is a company record made in the ordinary course of business and it was a part of the business of the company to do it.

Mr. Riley: If you will detach the last three pages, [749] I have no objection to the first page.

The Court: Proceed. The mechanics should be done outside of the court. Take the first page off and give back to counsel who produced it the remainder. I understood there was no objection to A-25. The offer is made, is it?

Mr. Koch: Yes, your Honor.

The Court: It is now admitted, consisting of one sheet of paper on which the clerk's marks have previously been placed.

(Defendant's Exhibit A-25 for identification received in evidence.)

The Court: The next is A-26. Let opposing counsel see A-26, A-27 and A-28.

Mr. Riley: I have seen A-26, your Honor. I object to all of it, all documents of A-26. They do not

(Testimony of Dudley S. Cox.)

appear to be the original records. They were made after the date of the crash.

Mr. Koch: The first page shows the stewardess completed ditching class August 30, 1951. There is nothing there that shows that was made after the accident. In fact, I don't believe it was. It was signed by the personnel of the airline in charge of stewardess training.

Mr. Riley: Then all we have to do is have her identify it. [750]

Mr. Koch: Mr. Cox will identify it.

Q. What is the document before you?

A. It is a statement signed by L. L. Law concerning the ditching training, last completed ditching class August 30, 1951, on Northwest interoffice communication.

Q. Who is Loren L. Law?

A. He was an instructor in the ground school training department.

The Court: It is an instructor's statement as to ditching teaching?

The Witness: Yes, sir, Miss Jane Cheadle, a stewardess.

Mr. Riley: I withdraw my objection to that part of it, just to speed things up.

The Court: Do you offer Defendant's Exhibit A-26?

Mr. Koch: I do, your Honor.

The Court: Admitted.

(Defendant's Exhibit A-26 for identification received in evidence.)

(Testimony of Dudley S. Cox.)

Q. Mr. Cox, did Captain Pfaffinger and Captain Kuhn fly together as a team with some regularity?

A. With some degree of regularity, yes, sir.

Q. Handing you what has been marked Defendant's Exhibit A-28, will you identify the document? What is that?

A. This is a statement concerning the number of flights and the dates on which these two pilots flew together as a team and the station from which the flight originated, [751] and the destination point.

Mr. Koch: I offer it in evidence, your Honor.

Mr. Riley: I would object, just briefly. Mr. Cox, this is another one of the reports made after the date of the crash as part of your continuing investigation of the crash, is that right?

The Witness: Yes, sir.

Mr. Riley: It is not the original records of the flights that these pilots flew together?

The Witness: No, sir, this is not the original record.

Mr. Riley: I believe my objection is valid, not the best evidence.

Q. Where would there be original records of the flights the pilots flew together?

A. There are two sources. One is the master aircraft logs, which are large sheets about three feet long and two feet wide, which are issued by the records department and are filed. They are not issued to all departments of the company. They are available, but they are filed in dead storage or

(Testimony of Dudley S. Cox.)

something like that. The only other records that would be available would be in the monthly assignment sheets, which would cover the assignment sheets of all pilots at this particular base, and one such assignment sheet would be a file of papers perhaps four or five inches thick. [752]

Q. Is this a summary of those records?

A. Yes, sir, this is a summary of those records.

Mr. Koch: Your Honor, I think it would be impossible to produce original records except as has been done here. It does not have any self-serving purpose. It actually gathers information with respect to the activities of these two pilots.

The Court: Are you sure it does not contain comments of the compiler of the effect of the data?

Mr. Koch: None that I am aware of.

The Court: You have not tendered the originals in court for the cross examination by opposing counsel, in case he might wish to cross examine as to any one of them.

Mr. Koch: There is no editorial comment of any kind, your Honor, just a factual statement of dates, places, trips flown together.

The Court: There is no means of cross examination and it is not admissible over objection, which I understand is made, so the ruling will be as to A-28 that the offer is rejected.

Q. Was A-28 which has just been referred to prepared under your direction? A. Yes, sir.

Q. Did you examine the original records at any time?

(Testimony of Dudley S. Cox.)

A. I have seen them. I didn't specifically examine them for [753] this purpose. I have seen the original records.

The Court: May I make this suggestion? It is not admissible because it was made for the purpose of a certain event and was not made as a business requirement as the day to day business reflected in it was performed.

Q. Handing you what has been marked Exhibit A-27, will you identify that, please?

A. This is the assignments of company operating manuals to Captain J. J. Pfaffinger and First Officer K. H. Kuhn, the manuals that were assigned to them by Northwest Airlines, which they had in their possession.

Q. Does that bear a date?

A. No, sir, does not bear a date.

Q. Do regulations require an issuance of manuals to members of the crew? A. Yes, sir.

Q. And a record of the issuance to be maintained by the company? A. Yes, sir.

Mr. Koch: I offer it in evidence.

Mr. Riley: It does not say what date. Mr. Cox, do you know from where this memorandum was taken?

The Witness: Yes, sir. The memorandum was taken from the—I believe it is the printing office that maintain a record of the assignments of the manuals to the various pilots so that they will know to whom to send revisions [754] and pages of manuals.

(Testimony of Dudley S. Cox.)

Mr. Riley: Was this probably taken after the date of the crash, as your other reports were, as a part of your continuing investigation?

The Witness: I think that is correct.

Mr. Riley: Same objection, if the Court please.

Mr. Koch: There is no other source of this information, if the Court please.

The Court: If it was made up for a purpose and in a manner different from that of the company's stated record making, namely, day to day as the business reflected by the record was done, then it is subject to objection. I understand it was made up especially, and had not been an accustomed record regularly kept. The offer is rejected.

Q. Handing you what has been marked 12, is that an extract from Volume D of Northwest Airlines Mechanical Division Manual?

A. Yes, sir, this is an extract from Volume D, Mechanical Division.

Q. What does it deal with?

A. The emergency and special equipment carried on aircraft overseas.

Q. Does that exhibit prescribe the specific emergency gear to be carried by an aircraft on a flight from Tokyo to Shemya to Anchorage to McChord Field? [755]

A. Yes, sir, it does.

Q. What emergency equipment does that exhibit require to be aboard?

A. It requires a map case; navigator's equipment; driftmeter tail support, that is for the air-

(Testimony of Dudley S. Cox.)

craft; spare radio equipment; walk around oxygen bottles; an Aldis lamp; fuel dipstick holder; Very pistols; emergency winter clothing; two twenty-man life rafts and a ten man life raft, on certain configurations; life vests.

Q. How many?

A. Four life vests in the cockpit in the proper stowage positions; and C-54G's, two in the hatrack stowage over each dual passenger seat, two in the holders under cabin attendant's seat or in the right rear hatrack, and a minimum of one for each passenger and cabin attendant stowed in the hatrack stowage. Gibson Girl, that is the manual emergency transmitter. I believe that covers it.

Q. Does the manual also prescribe a regular check of this equipment? A. Yes, sir.

Q. Were checks made of this equipment on Flight 324 of the 17th at Elmendorf?

A. Yes, sir.

Q. Were they made at Seattle?

A. Yes, sir. [756]

Mr. Koch: From the pre-trial order, may I have A-12 and A-14? I think A-15 is already in evidence.

(Before flight checkout inspection marked Defendant's Exhibit A-29 for identification.)

Q. Will you identify the exhibit before you?

A. That is a before flight check out inspection on ship 601, dated January 15, 1952.

Q. Where? A. At Seattle.

The Court: What is Defendant's Exhibit A-29

(Testimony of Dudley S. Cox.)

so far as the nature of the information contained in it is concerned?

The Witness: It shows——

The Court: Just say what it is.

The Witness: It is a check list.

The Court: A check list for what kind of information?

The Witness: For pre flight inspection.

The Court: It is a pre flight inspection record, is it, or not?

The Witness: Yes, your Honor, it is.

(Before flight checkout inspection marked Defendant's Exhibit A-30 for identification.)

The Court: What is the next one, A-30? What type of information?

The Witness: It is a pre-flight check record also.

Q. A-29 was made in Seattle, did you say?

A. Yes, sir.

Q. Is it made in accordance with the inspection requirements of the company? A. Yes, sir.

The Court: You may have from now until 4:30 to finish with this witness.

Q. When is that before flight checkout inspection made?

A. It was made on January 15, 1952.

Q. When in relation to the departure of the flight?

A. Made before the departure of the flight.

Q. How long before, do you know?

A. I couldn't say that directly. It is made be-

(Testimony of Dudley S. Cox.)

fore the airplane is—at least one hour before, maybe longer.

Q. Who makes the checks that appear on this exhibit?

A. The person accomplishing the pre-flight inspection.

Q. Is he a member of the crew at the point of departure?

A. No, sir, he is not a member of the crew.

Q. Is he a member of the ground crew?

A. He is a member of the ground crew.

Mr. Koch: I will offer the exhibit in evidence.

Mr. Riley: No objection.

The Court: A-29 is now admitted.

(Defendant's Exhibit A-29 for identification received in evidence.) [758]

Q. Will you identify A-30? You have already identified it, but when and where was it made?

A. Made at Elmendorf on January 18, 1952, by a member of the ground crew at the Elmendorf station.

Q. Was that prior to the departure of Flight 324 of the 17th from Anchorage?

A. Yes, sir, prior to departure from Anchorage.

Mr. Koch: I will offer that in evidence, your Honor.

Mr. Riley: I will not object to it.

The Court: A-30 is now admitted.

(Defendant's Exhibit A-30 for identification received in evidence.)

(Testimony of Dudley S. Cox.)

Q. Referring to A-29, that is the inspection at Seattle, can you tell from that exhibit whether the emergency gear required to be aboard was on board at the time this inspection was made?

A. Yes, sir, it was.

Q. Was it? A. It was.

Q. With respect to A-30, was emergency gear on board prior to the departure of the flight from Elmendorf, according to that inspection?

A. Yes, sir, and it was on board.

Q. Does the pre-flight checkout inspection at Elmendorf deal with life rafts and life vests? [759]

A. Yes, sir, life vests, life rafts, Gibson Girl transmitter, ditching ropes, map cases, navigator's equipment, etc.

Mr. Koch: Your Honor, except for checking my notes and going over the exhibits in order to extract those that deal with material which the Court required the manual provisions as the best evidence, I have completed my examination.

The Court: You may reserve the opportunity to do that in the morning. I wish you to do it promptly in the morning.

Q. Referring to the briefing which Northwest Airlines gave its passengers before departure from Tokyo, is Exhibit A-13 a copy of the type of briefing pamphlet, ditching pamphlet, that was given to the passengers?

A. Yes, sir, that is correct.

Mr. Koch: That is all.

The Court: You may cross examine.

(Testimony of Dudley S. Cox.)

Cross Examination

Q. (By Mr. Riley): You stated that the crew would not have a duty to instruct passengers as to location of rafts, because passengers do not have a duty to launch them; and at another point in your testimony you stated it would be necessary, probably, for passengers to assist the stewardess in launching the raft in the event of emergency or crash in the water? [760]

A. She has the option of drafting passengers who are sitting in that area.

Q. If that is true, why does the pamphlet attempt to show location of life rafts at all?

A. For reassurance to the passengers boarding the flight, that there is such equipment.

Q. Can you seriously say that the location of the rafts aft of the main cabin door rather than forward will not have an adverse effect upon passengers evacuating an aircraft after a crash on the water?

A. No, sir, I don't think it would have any adverse effect on evacuating.

Q. If you were a passenger in an airplane which crashed in the water and had no emergency lights in the cabin, how would you feel your way aft of the main cabin door to search for life rafts when you were in water and water was rushing into the cabin?

A. Well, sir, I would know myself where they were and what to look for.

Q. Assuming you didn't know where they were

(Testimony of Dudley S. Cox.)

and they were not in a location as established by the ditching pamphlet which you have before you, would you go behind the main cabin door and look for them at night in the dark after a crash in the water?

A. Yes, sir, I would go behind the main door.

Q. If you knew where they were?

A. I would look all over the airplane.

Q. And it is probable that some of the passengers would look for them in this crash, in your opinion?

A. I presume so. I couldn't answer that specifically. It is probable, yes, sir.

Mr. Riley: May the witness see A-17, the flight plan?

Q. It is true, isn't it, that this aircraft flew past Annette en route to Sandspit?

A. Past Annette?

Q. Yes.

A. It was at a point southwest of Annette, on a direct line from Sandspit to Midlap Point, but being past—it was some distance southwest of Annette station.

Q. Do you know what the letdown procedures are for the Annette Air Station?

A. I am reasonably familiar with the same.

Q. Do you know what minimum altitude in the approach to the field is?

A. In the case of an operation of this nature, it probably would be 800 feet.

Q. Referring to Exhibit A-17, do you have it

(Testimony of Dudley S. Cox.)

there? A. Yes, sir.

Q. Is that the flight plan?

A. No, sir, this is the medical examination.

Q. Would you refer to the weather report shown on the flight plan and the forecast for the weather at Annette airstrip after the pilot of Flight 324 departed from Annette on the night of January 19, 1952?

A. Forecast or weather sequence?

Q. Both. I will ask you to refer to the exhibit now before you, which is A-5, the communications record. Do you have the position log and the communications record of Flight 324 before you?

A. Yes, sir.

Q. Would you refer to the communications there, the forecasts which were directed to Flight 324 after it reported it had feathered the No. 1 engine and indicate what the weather reports for Annette Island were?

A. The weather report forecasted weather for Annette Island was 1,500 feet ceiling, broken, occasionally 700 feet, obscuration, one mile visibility, light snow showers.

Q. Would you state the weather observation again at that time for Sandspit?

A. Broken to overcast, Sandspit, 2,000, broken to overcast, occasionally 1,000, overcast, one mile, light snow.

Q. Actually, there is very little difference between the forecasted reports for Annette Island as compared to Sandspit, isn't that correct?

(Testimony of Dudley S. Cox.)

Mr. Koch: I don't believe Mr. Riley should testify, [763] even on cross examination.

The Court: That objection is overruled to that question.

A. The difference being that in the remarks section of the weather report, occasionally 700 at Annette with one mile visibility, and occasionally 1,000 at Sandspit with one mile visibility.

Q. Isn't it a fact that at Annette Island Coast Guard aircraft were stationed, it would probably be the fact that they had crash equipment, fire equipment at the field as well?

A. Not necessarily so, no, sir.

Q. Have you ever seen a military air station that didn't have crash equipment?

A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. Have you been to Annette when they didn't have crash equipment?

A. Yes, sir, I think that is correct. This is before this time.

Q. But the sea-going facilities at Annette air strip are located near the air strip, is that right?

A. In the hangar adjacent to the airport.

Q. They do have a hangar adjacent to the airport?

A. They are in a hangar there, yes, sir. [764]

Q. I would like you to indicate why, if Flight 324 was not in an emergency situation after it had feathered engine No. 1, why it elected to make an emergency landing at an emergency airport?

(Testimony of Dudley S. Cox.)

A. He was required to do so by regulation.

Q. And the requirement is he would consult with the flight superintendent and land at the nearest suitable airport? A. Yes, sir.

Q. Actually, there were no such consultations to determine which was the nearest suitable airport, were there? A. I considered there were, sir.

Q. Do you consider they gave consideration to the presence or lack of crash and rescue equipment at the point of intended landing?

A. I considered that they collaborated to that extent, by the exchange of these messages where the pilot advises he is proceeding to Sandspit, the forecast of additional weather by the flight superintendent, and it is left to him, saying, "Do you intend landing at Sandspit?", and thereby, in my opinion, acquiescing in his decision to land at Sandspit.

Q. You have stated that both the pilot and flight superintendent knew that there were no crash facilities and/or rescue equipment located at the airstrip?

A. With the exception of the Coast Guard station there. [765]

Q. And that they did know there were crash facilities and personnel stationed at Annette?

A. No, sir, I didn't think I made that statement. They knew of the Coast Guard station at Annette, but I don't know of any crash facilities at Annette Island at that time.

Q. But there is rescue equipment, and that is

(Testimony of Dudley S. Cox.)

the function of the Coast Guard, isn't that correct?

A. Yes, sir, they had that airplane stationed there.

Q. You stated that both the flight superintendent and the pilot were aware when they selected Sandspit of the fact that there were no crash facilities, rescue equipment, at that point?

A. Yes, sir.

The Court: That is as far as we will be able to go tonight. Before we adjourn, I wish to finally dispose of the question, after hearing further from both sides, and while this witness is on the stand and before the cross examination of him is completed, concerning the admissibility of the copy of the statement made by this witness as manager of flight operations, under date of January 17, 1952, and marked Plaintiffs' Exhibit 28 for identification, which I understood counsel to say he acquired himself from the records of the Civil Aeronautics Board, is that right?

Mr. Riley: Yes, your Honor. [766]

The Court: And which he claimed the right, under one case he cited, to have admitted in evidence. I wish counsel for defendant would consider this over the night further.

I wish to cite for your consideration, counsel on both sides, some authorities which gave the Court assistance, and which authorities have been located particularly by our law clerk. I wish to cite an annotation in 97 L. Ed. of United States Supreme Court reports, beginning at page 738, entitled,

(Testimony of Dudley S. Cox.)

“Matters within Jurisdiction of Civil Aeronautics Board,” and particularly the comment made by this one case, I believe the one cited by Mr. Riley for the plaintiffs.

(Other cases cited by the Court were *Ritts vs. American Overseas Airlines*, 97 F. Supp. 457; *Universal Airlines vs. Eastern Airlines*, 188 F. 2d 993; an annotation in 23 ALR 2d, beginning under the heading Section 2 on page 1336; *Tansey vs. Transcontinental & Western Air*, 97 F. Supp. 458; 23 ALR 2d, page 1361, 1362; 30 ALR 2d 1159.)

The Court: I wish to dispose of the matter before plaintiff finishes his cross examination of this witness whose statement is involved.

I wish to ask Mr. Riley to remind me at this time if there is another rejected exhibit which you offered which [767] concerned anything that was objected to and the Court sustained objection on the ground it is a part of the records and files of the Civil Aeronautics Board which are excluded under Section 581, Title 49. It seems to me there were some photographs or reproductions of photographs.

Mr. Riley: The photographs, and I am not clear what the ruling was with regard to the photographs. There was a limitation.

The Court: There was a photographic exhibit which showed some objects in the water, which was admitted, but the Court said the Court would not further consider the matter, the exhibit, until you

(Testimony of Dudley S. Cox.)

have had a chance and Mr. Koch has had a reasonable chance, and I ask that be done between now and tomorrow morning, to check further the authorities, and that is the subject of my present remarks. I want you to advise me finally if there is another such offered exhibit which the Court did not receive in evidence which involves this question of privilege as to the Civil Aeronautics Board records or anything that is a part of them.

Mr. Riley: There are other portions of reports made to the CAB to which counsel did not object, which are in the record.

The Court: I ask you between now and tomorrow morning to re-identify to me any rejected exhibits as to material [768] which defendant's counsel objected to on the ground that it was CAB material.

Mr. Koch: Your Honor, in the examination of Mr. Cox, the Court rejected the exhibit, the report of the attendance of the defendant's Air Sea Rescue class by Jane Cheadle, the stewardess of Flight 324, and the exhibit with respect to the manual assignments of crew members Pfaffinger, Kuhn and Cheadle, the Court saying that they were not original records.

The Court: Made for the purpose of the defendant, which were not ordinary business purposes?

Mr. Koch: Yes.

The Court: Purposes that arose after this accident?

Mr. Koch: At the time the Court ruled, I did

(Testimony of Dudley S. Cox.)

not have before me the language of the stipulation which was entered into in this case.

The Court: You gentlemen consider the stipulation. We will go farther with it in the morning. The Court is adjourned until tomorrow morning at 10:00 o'clock.

(Court was adjourned.)

The Court: I would like to dispose of this matter of whether or not the Court should change the ruling regarding at least one exhibit. I believe I identified that one yesterday, but I am not sure that I did so accurately, and I again repeat the inquiry I made of counsel [769] yesterday, was there still a second one?

Mr. Riley: There are two, your Honor, and in addition to Plaintiffs' Exhibit 29, which are the photographs. Both of these are inter-company reports.

The Court: The specific thing I mentioned yesterday was Plaintiffs' Exhibit 28, which was a copy of a statement made by this witness who is now on the stand concerning the accident. It is a photostat copy.

Now, as to Plaintiffs' Exhibit 29, there are seventeen photographs taken in January, 1952, of portions of objects in the water. Was that one that was not admitted because it was stated by the defendant's counsel that it was a part of the mass of material collected by the CAB?

Mr. Riley: It was admitted subject to a strict condition, and I am not sure that I have the condi-

(Testimony of Dudley S. Cox.)

tion that your Honor fixed upon it, but I was restricted in examining the witness concerning the photographs at the time.

The Court: Plaintiffs' Exhibit 29 was admitted, and about that or one other one the Court said the Court was not going to study it or consider it or look at it again until we considered this question as to whether or not the defendant or the plaintiff could find any other authorities touching this subject we are now considering.

Mr. Riley: I do recall that was the Court's observation at that time. [770]

(Brief discussion re Plaintiffs' Exhibit 29.)

Mr. Riley: There was another exhibit that was rejected because it was shown on the face of it to have been published subsequent to the date of the accident. That was the letdown chart or approach plate, as the witness called it. To save the Court's time with respect to that one, the defendant has since that time introduced an approach plate which was in effect at the time, and therefore I would withdraw my offer.

The Court: You wish to withdraw your offer of it because the matter has been obviated by information received in this case?

Mr. Koch: That is incorrect, your Honor. The exhibit that Mr. Riley has reference to was introduced by the plaintiff himself.

Mr. Riley: At any rate, it was part of defendant's documents.

(Testimony of Dudley S. Cox.)

The Court: This is Plaintiffs' Exhibit 26. Do you ask that that be withdrawn and returned to counsel who presented it here?

Mr. Riley: Yes, your Honor.

The Court: Is there any objection to such withdrawal?

Mr. Koch: No, your Honor.

The Court: Plaintiffs' Exhibit 26 is now withdrawn. Now, Mr. Riley, do you still urge, and in particular, in [771] connection with cross examination of this witness, the admission in evidence of Plaintiffs' Exhibit 28?

Mr. Riley: I do not urge the admission of Plaintiffs' 28 at this time, because Mr. Cox has testified to most of it, anyway. I don't care about 28, but I have two other documents which came from the same source, of the same nature.

The Court: Do you wish to withdraw 28?

Mr. Riley: I will withdraw 28.

The Court: Plaintiffs' Exhibit 28 is withdrawn and returned to counsel who produced it.

(Further argument re records and files of Civil Aeronautics Board.)

The Court: The Court is going to make no ruling on the question of specific evidence, because it is not before it. Was there any additional authority you wished to call to the Court's attention?

Mr. Riley: No, your Honor. I would like to make an additional offer, because I have two additional documents of the same nature.

(Testimony of Dudley S. Cox.)

The Court: Have they been identified as part of the plaintiffs' case in chief?

Mr. Riley: They were not, because we were not permitted to go further.

The Court: Does it concern this witness' testimony? [772]

Mr. Riley: Yes, your Honor.

The Court: You may mark them.

(Copy of maintenance data marked Plaintiffs' Exhibit 37 for identification.)

(Copy of flight superintendent's log marked Plaintiffs' Exhibit 38 for identification.)

The Court: Let opposing counsel see them.

Q. While that is being done, yesterday you classified the various categories of airports in Northwest Airlines as terminals, alternates, refueling and emergency airports, is that right?

A. Yes, sir. One was left out. It should have been "provisional," also.

Q. Are those classifications based, if you know, upon the equipment and facilities available at the bases? A. No, sir, they are not.

Q. Why is an emergency airport classed as an emergency airport?

A. Under our operating certificate, we have terminal airports into which we make regular stops. For your terminal airports, we have so-called provisional airports, which are the same general classification as a terminal airport. An alternate airport is an airport somewhere in the general vicinity, and is so classified as an alternate airport and

(Testimony of Dudley S. Cox.)

specifically mentioned in our operating certificate as an airport that we desire to use as an alternate for a [773] terminal or provisional. A refueling airport is an airport to which you go for the express purpose of refueling. You are not allowed to discharge or take on passengers at refueling airport, alternate airports or emergency airports. All other airports not under alternates and listed in our certificate, there is some classification, and they are generally lumped under the heading of emergency airports.

The Court: Is or is not Elmendorf prominent as a so-called refueling airport?

The Witness: Elmendorf?

The Court: I mean the one at Anchorage.

The Witness: No, sir, that was not listed as a refueling airport.

The Court: It may not be for you, but what about its present status?

The Witness: A number of non-scheduled airlines use it as a refueling point.

The Court: Does any foreign airline, that is, an airline organized under the laws of a foreign nation and having service to the United States, ever stop there under the conditions that I have spoken of?

The Witness: Yes, sir.

The Court: Permission to refuel, without permission to load or unload passengers? [774]

The Witness: No, sir, I can't state that.

The Court: Did you see any statement recently in the papers about any such thing as that?

(Testimony of Dudley S. Cox.)

The Witness: No, sir, I didn't.

Q. An emergency airport—is it true to say that an emergency airport for Northwest Airlines operations in 1952 would be used in an emergency?

A. It might be used in an emergency, providing that terminal, provisional and alternate airports are weathered in and you can't land at those points.

Q. Yesterday we were discussing the aircraft in question on the morning of January 19, 1952, at Sandspit airport, and assuming a visibility of one mile; and assuming further that pilot is required to maintain an altitude of 800 feet in his approach to the airport, and that he cannot descend below 800 feet until he has the field in sight; and assuming further that he is approaching the field at a speed of 120 knots: what rate of descent would have to be established at the time he sighted the airport?

A. At 800 feet per minute or above.

The Court: Rate of descent?

Mr. Riley: Yes, your Honor.

The Court: That does not mean a thing to me.

Q. As a matter of fact, if you were within one mile of the field, at 120 knots, how long would it take you to reach [775] the field?

A. Thirty seconds.

The Court: Is that what you mean by rate of descent, the time it takes to land after starting to land?

Mr. Riley: No, sir.

Q. If you had thirty seconds to reach the field,

(Testimony of Dudley S. Cox.)

800 feet high, what rate of descent would you have to establish to make the boundary of the airport? A. 1,600 feet, not exactly.

Q. Would you tell us what the normal rate of descent of aircraft in an approach is?

A. The normal rate of descent? That can be anything under a thousand feet. A normal rate of descent is between certain limits.

Q. Would you state what those limits are, in your understanding?

A. 500 to 1,200 feet a minute I would consider normal.

Q. And, as a matter of fact, 1,200 feet would be the maximum, isn't that correct?

A. The maximum? There is no maximum allowable. You can do——

Q. Under ordinary circumstances?

A. Under ordinary circumstances, I would think that 1,200 feet would be just about the——

Q. Would you explain what we mean by rate of descent?

Mr. Koch: I am going to ask that Mr. Riley be required to restate his hypothetical question, because he [776] has assumed facts which the witness has never testified to. He has assumed in his question a visibility of one mile, altitude of 800 feet, approaching from one mile at 120 knots per hour, but that has never been the testimony, and so the witness is being asked to testify to a rate of descent far different from what his direct testimony on the point was.

(Testimony of Dudley S. Cox.)

The Court: That is sufficient.

Mr. Riley: Each of those facts has been testified to, and if that is——

The Court: Do you recall offhand in what examination?

Mr. Riley: The first instance, the exhibit shows that the reported visibility was one mile, and Mr. Cox testified yesterday he assumed he approached the field at 120 knots.

The Court: I did not get that.

Q. Mr. Cox, would you state what the normal speed in the approach to the field would be, approximately? A. Approximately 120 knots.

The Court: The Court overrules the objection.

Mr. Koch: Your Honor, that is only one part of it. The other part of the objection goes to the fact that he approached from one mile. The testimony was that the——

The Court: Is there any testimony on that point?

Mr. Riley: Mr. Cox testified that—he had just [777] testified that the pilot could not descend below 800 feet at this airport until he had the field in sight. I stated the hypothetical question that if the visibility were one mile, then he could not descend, commence his descent until he was within one mile of the field.

The Court: What statement in the evidence is there about one mile visibility?

Q. Would you state what the reported visibility at Sandspit was at the time the aircraft made its approach to the field?

(Testimony of Dudley S. Cox.)

Mr. Koch: May he have the exhibit for that purpose, Exhibit A-5?

The Court: He may. If you have the information, Mr. Cox, give it, will you, please?

The Witness: At 1:30, the weather reported at Sandspit was 2,500 feet, I believe, and the visibility was one mile. I couldn't say how much. I think it was three or four miles at 1:30.

Q. Do you recall that the visibility was restricted in snow showers to one mile?

A. Yes, sir. That was a report in the remarks of the weather report on the forecast that was transmitted to the airplane.

The Court: I would like to know what day you spoke of, at 1:30.

The Witness: January 19th.

The Court: This 1:30, was it or was it not intended [778] by you to relate to the morning hour of 1:30?

The Witness: The morning hour, yes, sir, 1:30 A.M.

Q. What exhibit do you have before you?

A. This exhibit is A-5.

Q. Would you refer to the forecast of weather at Annette as transmitted to the pilot after the engine failed? A. The forecast at——

The Court: Do not say anything. Just refer to it, look at it. Have in mind the question. I want to get finished with this question and have every preliminary thing relate to the objections which are stated. Is that what you are doing?

(Testimony of Dudley S. Cox.)

Mr. Riley: Yes, sir.

Q. Would you state the forecasted weather for Sandspit airport as it is set forth in Exhibit A-5?

A. 2,000 broken, overcast, occasionally 1,000 overcast, one mile, light snow.

Q. What does the "one mile, light snow" mean?

A. That means the visibility is one mile when those conditions occur.

Q. Is there any other reported visibility restriction?

A. No, sir, there is not reported on the forecast.

Q. Now, referring to what has been marked for identification as Plaintiffs' Exhibit 37—

The Court: That is a copy of this witness' statement [779] of February 6, 1952.

Q. Do you recall receiving this communication, dated February 6, 1952?

A. Yes, sir, I received this communication.

Q. By whom was the report prepared?

A. Mr. E. B. Curry, manager of the maintenance division.

Q. Where are his headquarters?

A. His headquarters are in St. Paul.

Q. Was this requested by you in the course of your investigation of the crash of Flight 324?

A. Yes, sir, that was part of the exhibit for the CAB.

Q. Would this report normally be prepared by Mr. Curry?

(Testimony of Dudley S. Cox.)

A. This report would be prepared at Mr. Curry's direction.

Q. What was Mr. Curry's capacity at the time he prepared this report, or directed it be prepared?

A. He was manager of the maintenance division for Northwest Airlines.

The Court: Where?

The Witness: St. Paul, Minnesota.

Q. Did he have charge of all maintenance operations of the entire airline?

A. Yes, sir, he did.

Mr. Riley: I offer Plaintiffs' Exhibit 37 in evidence, having been so identified, your Honor.

Mr. Koch: I object to it. I can't see any ground [780] under which it is admissible. The report is dated subsequent to the accident. It is a report to the CAB. It is not shown to have been made in the regular course of the company's business as a routine record is made, and this witness, while he received the report, is not personally familiar with its contentions.

The Court: There is nothing in the cross examination, so far as I can see, to which it seems to relate. I don't know whether there is anything in it that counsel offers for the purpose of contradicting the witness in any statement the witness has made orally or whether or not it is offered in any way to affect his credibility as a witness, but plaintiffs' case in chief is closed now.

Mr. Riley: Yes, your Honor, I appreciate that.

(Testimony of Dudley S. Cox.)

I understood your Honor to say yesterday as we closed court that I was to ascertain if any other reports similar to Plaintiffs' Exhibit 28 had been identified.

The Court: I was talking about those marked for identification during the case in chief. The Court referred to that and nothing else. I was not inviting counsel to go outside the record made and bring out more testimony. That was not at all in the Court's mind or intended.

Mr. Riley: Very well, your Honor.

The Court: The Court sustains the objection at this time, with leave to renew the offer if as a part of the [781] cross examination the material becomes relevant or admissible.

Q. Will you refer to what has been marked for identification Plaintiffs' Exhibit 38? Do you recognize the document and can you tell us what it is?

A. This is a log of the things done and the times at which they were done and the telephone calls made by the Seattle dispatch office.

Q. Are there reports set forth in there, and I will refer you specifically to the entry made under 2:55 Pacific Standard Time, are there messages contained in that exhibit relating to transmissions to Northwest Airlines from Annette Air Station in Annette, Alaska?

A. Sent to Northwest Airlines? Yes, at 2:55 Pacific Standard Time——

Mr. Koch: Don't give what the message is.

The Court: Do not state what is in it. It is not

(Testimony of Dudley S. Cox.)

in evidence. Just state the nature of the information contained in it, or answer his question in a way other than by reading the contents of the exhibit.

The Witness: Yes, sir.

Q. Is there an entry in the flight superintendent's log, which is identified as Plaintiffs' Exhibit 38, indicating the time at which the Coast Guard at Annette——

The Court: Could you say, referring to the time [782] when something happened, instead of indicating that it did happen then.

Q. Is there an entry contained in what is marked for identification Plaintiffs' Exhibit 38 which indicates the time at which the Coast Guard at Annette was alerted?

Mr. Koch: I object to the question again, your Honor. It is calling——

The Court: The objection is sustained with leave to ask the type question which the Court suggested was permissible, if you wish to do that. You are not required to ask any question.

Q. Referring to the first page of what has been marked for identification Plaintiffs' Exhibit 38, is there a record of any communications to and from the Coast Guard at Annette Island in Alaska?

A. Yes, sir, there is.

Mr. Riley: I offer Plaintiffs' Exhibit 38 in evidence on the statements made by the witness, and using it for the purpose of cross examination which was elucidated yesterday on direct relating to the

(Testimony of Dudley S. Cox.)

relation of Annette Island to the crash of the aircraft at Sandspit.

Mr. Koch: I object to the exhibit. Here again the witness testified yesterday with respect to there being certain facilities at Annette Island. If this exhibit confirms that fact, it is cumulative only.

It does not [783] add anything to the cross examination, that I can see, and it is still a CAB report.

The Court: The objections to it are overruled. Plaintiffs' Exhibit 38 is now admitted.

(Plaintiffs' Exhibit 38 for identification received in evidence.)

Q. I will ask you, Mr. Cox—

The Court: It would be appropriate to ask him to read any word or figure on it, or you could read any word or figure or any part of this exhibit.

Mr. Riley: If the Court please, I will direct the Court's attention to the entry made at the time indicated on the flight superintendent's log, identified as Plaintiffs' Exhibit 38, at 0252 Pacific Standard Time: "Coast Guard at Annette is alerted and will proceed to scene of crash." By ATC, Seattle. It is about midway down the page, on the first page.

The Court: You may proceed.

Q. What is the significance of that message, if any, as you understand it?

A. Well, as I understand the message, that Air Traffic Control in Seattle advised the dispatch office at this time that they had information that the Coast Guard at Annette is alerted, I presume that means, and are standing by. It doesn't really

(Testimony of Dudley S. Cox.)

mean that they have been alerted as of [784] that time.

The Court: What time was it?

The Witness: 2:52 A.M., January 19th.

The Court: Is that before or after the crash?

The Witness: That is after the crash, sir.

Q. It is a fact that Air Sea Rescue facilities at the time of this crash were not alerted until after the crash?

The Court: Is it or is it not?

Q. Is it or is it not a fact that Air Sea Rescue facilities were not alerted until after the crash of Flight 324 on the night of January 19, 1952?

Mr. Koch: Your Honor, in view of the previous testimony in this case that this is done not by the defendant but by the Government radio circuit, I think this is improperly directed to this witness.

The Court: The objection is overruled. Answer the question.

A. The Coast Guard were alerted after the crash.

The Court: Is that the question you presented?

Mr. Riley: That is sufficient answer, your Honor.

Q. The Coast Guard in this area and in the area of Sandspit is in charge of Air Sea Rescue facilities? A. That is a fact.

Q. And was it a fact in January, 1952?

A. That is correct. [785]

The Court: There is a certain date in January, 1952.

Q. Was that true on January 19, 1952?

(Testimony of Dudley S. Cox.)

A. Yes, sir, that is true.

Q. I refer you to what has been identified as Plaintiffs' Exhibit 6, and I will ask you to circle and initial the location of Annette Island airstrip.

A. Well, about where it should be?

Q. Yes. Will you initial that circle so that it may be so identified? Will you state for the record what you have marked on the map?

A. It is the approximate location of the Annette Island airport.

Q. Referring to the same exhibit, Plaintiffs' Exhibit 6, will you mark with an X and initial the spot at the approximate location, as you understand it, where Flight 324 feathered the No. 1 engine on the morning of January 19, 1952? Will you state for the record what you have marked?

A. Approximately only the position of abeam Sitka where Flight 324 feathered the engine on January 19th.

Q. Was Flight 324 over land or over water at that time? A. Over water.

Q. Will you state whether or not Annette Island was nearer to the position at which Flight 324 feathered the No. 1 engine than Sandspit?

A. Yes, sir. It was nearer on a direct line from——[786]

Q. That is sufficient.

Mr. Koch: May he complete his answer?

The Court: Yes. If you did not complete your answer, Mr. Cox, you may do so.

A. Well, a straight line from that point to An-

(Testimony of Dudley S. Cox.)

nette is closer than to Sandspit. If, however, he proceeded by the airways, it would still be closer by 22 miles, 23 miles.

Mr. Koch: Which would be closer by 23 miles?

The Witness: Annette would be closer to this particular point by 23 miles.

The Court: At what point with reference to the occurrence of the crash?

The Witness: This was at the time he feathered the No. 1 engine, at a point abeam Sitka, at about 12:03 A.M., January 19th.

The Court: Was there any other reasonably available landing place at that time other than the ones you were considering in your last answer?

The Witness: They are at a greater distance than these two.

The Court: And those two were what? Repeat, please.

The Witness: These two are Annette Island and Sandspit, and they are the closest to this particular point that he feathered the engine.

Q. Did I understand your testimony correctly yesterday when [787] you stated Annette Island had longer runways than Sandspit?

A. I believe that is correct.

Q. And the Coast Guard facilities are located on and adjacent to the airstrip at Annette, is that correct? A. That is correct.

Q. Do you know whether or not the Coast Guard at Annette dispatched equipment and personnel

(Testimony of Dudley S. Cox.)

after they were alerted to Sandspit to assist in rescue operations at Sandspit?

A. Not immediately, sir.

Q. Do you recall how long it took them to institute action?

A. It was some time. I can't state precisely.

Mr. Riley. At this time I direct the Court's attention to the last entry on page 1 of Plaintiffs' Exhibit 38, an entry at 0316 Pacific Standard Time.

The Court: I have it.

Q. I would like to read this to the witness: "Ann advised 404 that they have boats with outboard motors that they could put on them to take to ZP. This was in case the crash boat that was supposed to be heading to the scene would take too much time to get there."

As you understand that transmission, Mr. Cox, did the Coast Guard fly additional equipment to Sandspit from Annette?

A. Did they fly additional equipment? I can't recall that they did. I can't recall that particular point.

Q. Does that transmission indicate to you that they would [788] have or that they were?

A. That there was some boats and outboard motors at Annette which could be transported, and it is my personal recollection that there was a non-sched C-46 in that vicinity which they would use to do that job, and I don't recall now——

Q. Did they dispatch a crash boat from Annette to Sandspit?

(Testimony of Dudley S. Cox.)

A. There was a Coast Guard cutter stationed at Ketchikan. It wasn't what we refer to as a crash boat. It was a cutter, I believe, and they did not dispatch that boat at that time.

Q. Do you know why they did not?

A. No, sir, I couldn't say.

Q. How long would it have taken the crash boat or cutter to have reached Sandspit from Annette Island had it been dispatched, under ordinary conditions?

A. From Ketchikan, about eight hours, I'd guess.

Q. Where is Ketchikan in relation to Annette?

A. It is about twenty miles north of Annette.

Q. Referring to Plaintiffs' Exhibit 33, I will ask you if you can read from that exhibit Civil Air Regulation 41.127 as shown by that document to have been in effect on January 19, 1952.

A. That is 41.127, use of emergency equipment. "The emergency equipment required by 41.23 must be periodically inspected and tested in accordance with specifications [789] issued by the administrator. The crew of aircraft used in overwater flights shall be drilled periodically in 'abandon ship' procedures. Passengers shall be acquainted with the location of emergency exits, with emergency equipment provided for individual use, and with the procedure to be followed in the case of an emergency landing on the water."

Q. Mr. Cox, as manager of flight operations for Northwest in January, and specifically on January

(Testimony of Dudley S. Cox.)

19, 1952, what is your understanding of that section of the Civil Air Regulations which you have just read as to the duty of the airline, and Northwest Airlines in particular, to have briefed the passengers on Flight 324 of January 19, 1952?

A. Well, sir, may I inquire with reference—with reference to commercial passengers, I understand our duty as put forth in this regulation. It is to not only drill the members of the crew and to give them periodic instruction, but also to brief the passengers in the location of emergency gear and how to use that emergency gear with respect to life rafts, life vests, and the location of the life rafts.

Q. Yesterday you referred to the contract with the Air Force and Northwest Airlines and made reference to the term “briefing.” Ordinarily, with reference to the crews of a ship, and at this time in January, 1952, what does a [790] pilot or an air crewman or an airline representative consider the term “briefing,” with no other qualification, to mean?

A. As an air crewman, briefing is simply for the relating of something to someone else that is pertinent to whatever you are talking about.

Q. In these flights, these transpacific flights wherein refueling was accomplished at military installations, did the crews receive briefing from Air Force or armed forces personnel with respect to weather and conditions of flight en route and condi-

(Testimony of Dudley S. Cox.)

tions of fields and facilities en route to the point of destination?

A. Principally with respect to weather.

Q. Was Northwest Airlines provided with such a service at Haneda in Japan in January, 1952?

A. The service was there and available if we desired it.

Q. Did Northwest Airlines have its own briefing facilities? A. Yes, sir.

Q. Was this true at Shemya? A. Yes, sir.

Q. Was the information acquired from the military, armed forces, at both of those installations?

A. It was provided by means of Northwest-operated radio, I believe, and the military radio, and the intercept the listening watch that was maintained on Russian stations by [791] the military for the purpose of drawing weather maps, and also over all circuits that were available, I should say.

Q. Was that true in Anchorage?

A. Yes, sir, that was true in Anchorage also.

Q. Would there be a difference between passenger briefing and crew briefing?

A. With respect to emergency drills or weather briefing?

Q. Weather briefing.

A. Yes, sir, there would be a great deal of difference.

Q. Referring to Plaintiffs' Exhibit 21, will you refer to page 3 and read your statement concerning the company policy for engine out operation in

(Testimony of Dudley S. Cox.)

January 19, 1952, at the time of the crash of Flight 324 at Sandspit, British Columbia?

A. "Company Policy for Engine-Out Operation. 1. The Captain and Flight Superintendent shall collaborate and determine what is the nearest suitable airport taking into consideration such factors as: a. Nature of the malfunctioning and the possible mechanical difficulties that may be encountered if flight is continued including failure of other engines.

b. Altitude, aircraft weight and usable fuel at time of stoppage.

c. Weather conditions and terrain en route and at possible landing points. [792]

d. Air traffic congestion en route and at various available airports.

e. Pilot's familiarity with the airport and surrounding terrain.

f. Nature of failure insofar as related to airport safety facilities such as crash and fire-fighting equipment.

2. Upon reaching an agreement with the Captain as to which is the nearest suitable airport, the Flight Superintendent shall clear the flight to that airport. Note: In the event two airports are considered suitable and as safe, clearance shall be made to the nearest in point of time.

3. If after arrival over the nearest suitable airport to which cleared, the Captain decides to continue, such continuation must be made under his emergency authority, the exercise of which shall

(Testimony of Dudley S. Cox.)

be predicated on safety reasons only. No continuation shall be predicated——”

The Court: What is the use of reading everything? Do you want everything read?

Mr. Riley: That is sufficient, your Honor.

The Court: We do not have time enough to read everything.

Mr. Riley: That portion is sufficient. That concludes my cross examination of Mr. Cox.

The Court: Is there any redirect? Try to have in mind the passage of time. [793]

Mr. Koch: Your Honor, am I correct in assuming that the hypothetical question and the answers are stricken, inasmuch as Mr. Riley did not pursue them?

The Court: I do not know what you have in mind. The record will show the Court’s ruling. If it is absolutely indispensable to your further interrogation that you be reminded exactly what took place, I will have it read, if you will tell me what place it was in the record.

Mr. Koch: The Court did not make a ruling. The Court advised Mr. Riley he would have to ask more questions and——

The Court: I suggested one way on cross examination to have identified and properly lay the foundation for admission in evidence of an exhibit not previously admitted as part of plaintiffs’ case in chief.

Mr. Koch: That is not what I have reference to, your Honor. Previously there was a hypothetical

(Testimony of Dudley S. Cox.)

question that stated as follows: assuming a visibility of one mile——

The Court: I ask you to proceed with the questioning of this witness, if you wish to ask him anything on redirect examination.

Redirect Examination

Q. (By Mr. Koch): Mr. Cox, on cross examination yesterday reference was again made to pre-flight check, do you recall that? A. Yes, sir.

Q. Can you tell me how many inspections are made before an airplane on a MATS overwater flight from Seattle to Tokyo departs?

Mr. Riley: This question is very leading. I object.

The Court: The objection is overruled. This is redirect. He is entitled to be summarizing the questions to a fair extent.

A. There are three such inspections made before the aircraft departs from Seattle.

Q. What are the three?

A. Well, the mechanic who puts the equipment on board and signs a pre-flight inspection; the inspector who inspects the equipment and certifies——

Q. When you say equipment, you are referring to what equipment?

A. Emergency equipment, the life rafts, life vests, etc. Then the inspector who certifies on his checklist and signs his name that the equipment is there and in place; and following that, the aircraft is delivered to the ramp and the flight crew inspect

(Testimony of Dudley S. Cox.)

the aircraft with respect to this emergency equipment and assure themselves that it is there. If it isn't there, the aircraft can't depart until it is there. [795]

The Court: Defendant may have five more minutes to inquire of this witness.

Q. With respect to the pre-flight inspection which is introduced as an exhibit, there was an inspection from Seattle called a pre-flight inspection which was admitted in evidence, and also one from Elmendorf? A. Yes.

Q. Which one of those three checks is that one, do you know? A. That is by the mechanic.

Q. That is the mechanic's check?

A. Yes, sir.

Q. Is that a part of the inspection department?

A. No, sir, that is not part of the inspection department.

Q. What is the check that is made following that? That is the check by the crew?

A. After the airplane is delivered on the ramp. Before that, after the mechanic signs the airplane off, in connection with that at that time there are two people that inspect it. The inspection department certifies that the equipment is there. Then the aircraft is delivered to the ramp and the flight crews board the airplane and examine the airplane to see that this equipment is on board and is in proper quantities and numbers.

Q. Does the airline require the crew to make such inspection? A. Yes, sir. [796]

(Testimony of Dudley S. Cox.)

Q. Would it have been possible at the time this plane went in the water for the life rafts to have been launched before the passengers got out of the plane?

A. I couldn't answer that. It may have been possible, sir. There is undoubtedly confusion and wreckage and seats torn loose and things of that nature, darkness, and scrambling around, opening emergency exits. There was undoubtedly that confusion, plus the fact that the water was coming in the aircraft. I couldn't really state positively that it was a possibility or probability.

Q. Do you know whether or not an attempt was made to launch the life rafts?

A. Yes, sir, we know.

Mr. Riley: Objection.

The Court: Answer yes or no.

A. Yes, sir.

Q. What do you base your answer upon?

A. The fact that one life raft was protruding from the astrodome of the aircraft, the top of the fuselage, and could be seen as we passed over the airplane in a boat in the water, could see the raft and was easily identified, plus the fact that one of the survivors at McChord General Hospital stated——

Mr. Riley: Objection. Now we are getting into hearsay, your Honor. [797]

The Court: You cannot say what he said.

Q. Were any of the twenty-man life rafts recovered? A. Yes, sir.

(Testimony of Dudley S. Cox.)

Q. Where? A. On the beach at Sandspit.

Q. Do you know whether or not they were inflated to determine whether they were in working order?

A. One was taken to St. Paul and inflated in the normal manner of inflation, and it proved usable in every respect.

Q. Does Civil Air Regulation 41, that is Plaintiffs' Exhibit 33 that you have before you, require the pilot to notify the passengers of a three engine operation prior to the time an actual emergency is declared?

A. No, sir, I don't think there is any such requirement.

Q. Does it impose any duties upon the crew with respect to the passengers before an emergency is declared?

The Court: To your knowledge.

A. No, sir, none to my knowledge.

Q. Is the declaration of an actual emergency discretionary with the pilot? A. Yes, sir, it is.

Q. Is the declaration of a potential emergency discretionary with the pilot?

A. Well, yes, sir. That is obvious, it has to be.

Q. If the engine ceases to function and is feathered, does [798] a potential emergency exist?

The Court: Do you believe that you have not asked him on this subject before in your direct?

Mr. Koch: I was afraid it had been——

The Court: It has been gone over so many times

(Testimony of Dudley S. Cox.)

that it is very easy for me to be convinced that it has been done with this witness.

Mr. Riley: It has been covered, Your Honor, I think both on direct and redirect.

The Court: The Court asks counsel to ask a different question.

Q. Will you turn again to Part——

The Court: At this time the examination by the defendant of this witness is terminated. We will have about a ten minute recess.

(Recess)

The Court: Does the plaintiff wish to ask anything vital of this witness?

Mr. Riley: No, Your Honor.

Mr. Koch: I wonder if I might have leave of the Court to finish the one I was asking.

The Court: Will you ask literally one question?

Mr. Koch: Just one question.

Q. (By Mr. Koch): Will you refer to Plaintiffs' Exhibit 33 and Section 41.127 with reference to the duties of the [799] crew to the passengers with respect to emergency equipment? In your interpretation of that section, is the life raft to be considered individual equipment for the use of passengers? A. No, sir.

Mr. Koch: That is all.

The Court: Is there anything further?

Recross Examination

Q. (By Mr. Riley): With respect to that sec-

(Testimony of Dudley S. Cox.)

tion, Mr. Cox, a life raft is emergency equipment, is it not? A. Yes, sir.

Q. And doesn't Section 41.127 say that, "Passengers shall be acquainted with the location of emergency exits, with emergency equipment provided for individual use, and with the procedure to be followed in the case of an emergency landing on the water."?

A. That is what it states, yes, sir.

Mr. Riley: That is all I have.

The Court: You may step down. Call defendant's next witness.

(The witness was excused.)

Mr. Koch: Your Honor, at this time I would like to read the deposition of Richard Fields.

Mr. Riley: I have never had a copy of the [800] deposition of Mr. Fields, but I will be glad to—I don't know what arrangements you want to make with reference to it. I can read the Court's copy, I presume. There are only two copies in court.

The Court: Every Court should, and this Court will sooner or later strike and suppress a deposition in a civil case because counsel at whose request the deposition was taken did not provide the opposing counsel a copy and an extra copy for use by the Trial Judge during the time the deposition is being offered in evidence. You may proceed.

Mr. Koch: This deposition was taken in Los Angeles. I had no part in it except to ask——

The Court: Did you ask someone in Los Angeles to represent you in the taking of it?

Mr. Koch: Yes, Your Honor.

The Court: It was taken at your client's request?

Mr. Koch: Yes, Your Honor.

The Court: Then the statement that the Court has just made applies to your client and his attorney. You may proceed.

Mr. Riley: I would like to state I am not objecting to this deposition, because I think it is of assistance to the plaintiffs' case.

The Court: That is not a good habit to form, to make [801] statements like that in the course of trial procedure. It is not a reason for receiving or excluding a deposition, so I would not get in the habit of making statements like that.

Mr. Riley: I will ask that it be disregarded.

The Court: It will be. I was mentioning it more because of future situations.

Mr. Koch: Starting page 3, line 8:

(reading deposition)

At line 4, page 4:

Mr. Koch: I think we can skip this preliminary portion.

Mr. Riley: I suggest you strike the whole of page 5. It is just repetition by counsel.

The Court: Turning to what, please?

Mr. Koch: Page 6, line 2, Your Honor:

(reading deposition)

At line 25, page 8:

Mr. Riley: I object to this question on the ground it is leading, if the Court please.

The Court: The objection is overruled.

Reading of deposition resumed at line 26, page 8:
(reading deposition)

At line 2, page 15:

Mr. Koch: Skipping to line 24: [802]

Mr. Riley: If the Court please, because I would go back and put this in, I think we might as well finish this page.

The Court: He is not required to take his time for that. He has the privilege of omitting any part of it he wishes.

Mr. Koch: Beginning at line 18, page 15:
(reading deposition)

At line 12, page 16:

Mr. Koch: Skipping to line 26, page 16:
(reading deposition)

At line 24, page 17:

Mr. Riley: I object to the question. It is leading. The bulk of ours was excluded.

(After further argument on the objection, the objection was withdrawn by Mr. Riley.)

The Court: Proceed. The objection stated is withdrawn.

Mr. Koch: I will withdraw that question.

The Court: You may do that. Withdraw the answer, likewise.

Mr. Koch: Page 18, line 13:
(reading deposition)

At line 5, page 19:

Mr. Koch: I believe that is all that is relevant.

The Court: This deposition is received as part of defendant's case in chief with like effect [803]

as if the witness in question had been present and orally testified from the witness stand as is stated in the deposition.

Mr. Riley: In effect as cross examination, may I read those portions of the exhibit which were excluded?

The Court: You may read any part of the deposition desired by the plaintiffs not already read.

Mr. Riley: I refer the Court to page 15, line 3:
(reading deposition)

At line 15, page 15:

Mr. Riley: Turning to page 16, line 13:
(reading deposition)

At line 17, page 16:

Mr. Koch: "The water was cold enough to create a numbness in my limbs immediately afterwards." The remainder of that answer, after the first sentence, I object to as hearsay, a hearsay reply.

Mr. Riley: Counsel took this examination and——

The Court: He is not offering it, however, and the objection is sustained.

Mr. Riley: Page 16, line 20:
(reading deposition)

At line 25, page 16:

The Court: Do counsel agree that the "32" in the answer refers to 32 degrees above zero?

Mr. Riley: Yes, Your Honor. [804]

Mr. Koch: I assume so, Your Honor.

Mr. Riley: Page 17, line 23:
(reading deposition)

At line 24, page 17:

Mr. Koch: I object to the question on the ground that the Court has already ruled that such testimony——

The Court: I am inclined to that view. Why is that not true?

Mr. Riley: Because he has been permitted on direct examination to point out that he has not had any condition from a date a year subsequent to the accident.

The Court: Where is that said?

Mr. Riley: Line 13, page 18, “Starting from the period January 1, 1953, up to this date——”

The Court: Where is this question that is now objected to?

Mr. Riley: This question commences page 17, line 23.

The Court: The objection is overruled.

Mr. Koch: Your Honor, he did not object to the question I asked, but I am objecting to the question he has asked. The question I asked related only to absence of further difficulty, but not to the nature of the difficulties previously excluded by the Court in prior testimony.

The Court: The objection is overruled. [805]

Reading of deposition resumed at line 23, page 17:

At line 24, page 17:

The Court: You are asking how long, not what it was? At line 26, he speaks of the time.

Mr. Koch: I would object again, Your Honor, because his answer is not responsive. It says how

long was it before he was completely free, and the answer appears at line 13, page 18. Everything between it and there describes the difficulties which he had and is not responsive to the question asked.

The Court: The objection is overruled. The answer beginning at line 25, page 17, may be read.

Reading of deposition resumed at line 25, page 17:

(reading deposition)

At line 2, page 18:

Mr. Riley: I don't care to offer any more of it.

Mr. Koch: I will put in the rest of it, Your Honor, the top of page 18, line 3:

The Court: You may do that.

Reading of deposition resumed at line 3, page 18:

(reading deposition)

At line 12, page 18:

Mr. Koch: That is all, Your Honor.

The Court: All this deposition that has been read is received in evidence in connection with the reception [806] of evidence in the defendant's case in chief.

Mr. Koch: Now, I would like an opportunity to put into the record those portions of the testimony of Lt. Baker which were excluded by Mr. Riley when he used the deposition.

The Court: You may do that. The deposition of Donald E. Baker is now receiving attention. You may proceed, as to those parts not previously read in evidence as a part of the plaintiffs' case in chief.

Mr. Koch: Commencing at page 8, line 25:

(reading deposition)

At line 20, page 9:

Mr. Koch: Skipping now to page 14, line 19:

(reading deposition)

At line 17, page 15:

Mr. Riley: I will withdraw the objection at line 23.

The Court: Proceed. Are counsel able to agree in what capacity this witness, Mr. Baker, served this flight, if he did serve it?

Mr. Koch: He was a passenger, Your Honor. Isn't that true, Mr. Riley?

Mr. Riley: That is true.

Mr. Koch: Skipping down to line 8, page 16:

(reading deposition)

At line 12, page 18: [807]

Mr. Riley: That part of the testimony has already been covered.

The Court: I am sure it was an inadvertence. You may proceed.

Mr. Koch: If so, it was in error.

The Court: May I suggest to you, Mr. Riley, that the Court had marked on the Court's copy that the reading by the plaintiff stopped with the word "shield" on line 12 and that thereafter on that page it was not read.

Reading of deposition resumed at line 13, page 18:

(reading deposition)

At line 22, page 19:

Mr. Koch: Skipping to line 25:

(reading deposition)

At line 5, page 20:

Mr. Koch: Line 21, page 20:

(reading deposition)

At line 25, page 20:

Mr. Koch: Skipping to line 8, page 21:

(reading deposition)

At line 17, page 21:

Mr. Koch: We have covered this already. Excuse me. Page 22, line 21, is it not?

(reading deposition)

At line 25, page 22: [808]

Mr. Riley: This is a part that has been read.

The Court: The reading at this point continued down to line 6, page 23, at which place, down to line 20, there was an omission. You may recall the reason stated for the omission. The reading resumed and continued down to line 24 on page 24.

Mr. Koch: Line 12, Your Honor.

Mr. Riley: I believe it is line 12, page 24.

Reading of deposition resumed at line 13, page 24:

(reading deposition)

At line 11, page 25:

Mr. Koch: Line 12, page 26:

(reading deposition)

At line 20, page 28:

Mr. Riley: I object to the question, being leading.

The Court: Who took the deposition?

Mr. Riley: This is my part of the direct examination, Your Honor.

The Court: The objection is overruled, if you

ask the question, or if Mr. Koch did, because, as I understand it, you are the one who asked the question and no objection was made, and Mr. Koch has a right to read it.

Mr. Koch: I am going to read the question and then skip the intervening material, the colloquy.

The Court: You may do so. [809]

Reading of deposition resumed at line 19, page 28:
(reading deposition)

At line 14, page 29:

Mr. Riley: The answer is at line 20.

Reading of deposition resumed at line 20, page 29:
(reading deposition)

At line 6, page 31:

Mr. Koch: Skipping to line 18, page 35:
(reading deposition)

At line 7, page 36:

Mr. Koch: Page 38, line 3:

At line 6, page 39:

The Court: Do counsel agree as to what village that refers to? Is it Sandspit or some other village?

Mr. Riley: I am sure it is Sandspit, Your Honor.

Mr. Koch: I would imagine so, too, Your Honor. That is all. The cross examination was substantially covered, as I recall, Your Honor.

Mr. Riley: I have nothing further, Your Honor.

The Court: This part of the deposition will be received as part of defendant's case in chief. We will take the noon recess until 1:30 o'clock.

(Recess)

The Court: You may proceed.

(Dr. Alfred Sheridan was called as a witness by [810] defendant, was sworn, and testified.)

(Argument between counsel re calling of Dr. Ruuska and Dr. Crystal by defendant, and offer of proof by Mr. Koch. The privilege of inquiring of Dr. Ruuska and Dr. Crystal as defendant's witnesses in respect to the matters and things stated in the offer of proof was denied.)

(Further argument re certain exhibits which were excluded from evidence relating to the history and training of co-pilot Kuhn and stewardess Cheadle.)

The Court: The Court sustains the objection as formerly, and I wish you to understand that completes the Court's action upon that type of offer. You may proceed.

GENE KINGSTON

called as a witness by the defendant, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Koch): Will you state your name, please? A. Gene Kingston.

Q. What is your address?

A. 17835 May Creek Road, Renton, Washington. [811]

Q. What is your present employment?

A. I am employed as an Air Traffic Controller at Renton, Washington.

(Testimony of Gene Kingston.)

The Court: Who pays your salary, if anybody does?

The Witness: The City of Renton.

Q. You are stationed at the Renton Airport, are you not? A. Yes, sir, that is correct.

Q. Do you have a pilot's license, too?

A. Yes, sir, I do.

Q. What type of license?

A. Commercial license with ratings, single and multi-engine, land and sea, flight instructor, instrument.

Q. What was your occupation on January 19, 1952?

A. Air Traffic Controller with the CAA at Annette Island, Alaska.

Q. What were the duties of your position?

A. To control and expedite all air traffic within the area that is assigned to Annette Island. That would be en route traffic going from one station to another and through our area, and also traffic landing and departing from Annette Island.

The Court: For whom did you say you were working then?

The Witness: At present?

The Court: No, then.

The Witness: The Civil Aeronautics Administration. [812]

The Court: When were you there so employed at that island? Give the limits of it, if you can. What

(Testimony of Gene Kingston.)

days in the month of January, 1952, were you there employed?

The Witness: All of January.

Q. Were you on duty the night of January 19, 1952? A. Yes, sir, I was.

Q. As Air Traffic Controller of Annette Island?

A. Yes, sir.

Q. Are you familiar with the accident to Northwest Airlines Flight 324 of the 17th which that night crashed off the coast of British Columbia near Sandspit? A. Yes, sir, I am.

Q. Were you in contact with that flight during the course of its trip from Anchorage south?

A. Yes, sir.

Q. Did that flight contact the Annette radio station? A. Yes, sir.

Q. Do you recall when it did so?

A. I couldn't give you the exact minute. I can tell you the position of the flight.

Q. Where was the flight when you first heard from it? A. Southwest leg of Sitka.

The Court: May I have that answer?

The Witness: That was by the southwest leg of Sitka radio range, Your Honor. [813]

Q. What do you mean by the southwest leg of the Sitka radio range?

A. That is a position that the aircraft reports immediately after entering the control area assigned to Annette Air Route Traffic Control, and it is a geographical position approximately thirty or forty miles southwest of Sitka, Alaska.

(Testimony of Gene Kingston.)

The Court: Where is Sitka with respect to the trip from Annette Island to Sandspit or Anchorage or any other two termini?

The Witness: Sitka is a direct line from Anchorage to Sandspit. Annette Island is approximately fifty miles east of that line, approximately fifty miles south of that line. Does that make it more clear?

The Court: Yes, only I do not understand where the two or three are in relation to each other.

The Witness: Sitka——

The Court: May I interrupt you to ask this: do you have in mind what you were doing and what the time was, approximately, when you last heard from or were in contact with the airplane on Flight 324 which crashed at Sandspit, British Columbia, in the early morning hours of January 19, 1952? If so, state yes or no.

The Witness: Yes.

The Court: Where was that plane when you last [814] identified its position before it actually crashed on Sandspit runway?

The Witness: Over Sandspit, starting its initial approach to landing.

The Court: You may inquire.

Q. Handing you what has been marked Defendant's Exhibit A-5, which is a list of messages reported in what is the flight position log, will you read the first message that you received at Annette Island from Flight 324?

A. "Northwest Airlines Flight 324 southwest

(Testimony of Gene Kingston.)

Gustavus at 0737 Greenwich, cruising 8,000 feet, estimating Sitka at 0757 Greenwich time."

Q. What time in Pacific Standard Time is that?

Mr. Riley: You are referring to the time of transmission or the estimated over Sitka? I felt that should be clarified, your Honor.

The Court: That is sufficient. Did you address your question to the witness? You should not do that.

Mr. Riley: I didn't intend to. I was actually directing it to counsel.

The Court: Address all statements and objections to the Court.

Mr. Riley: Yes, your Honor. There are two times there. I wanted it to be clear which time.

The Court: Is it convenient for counsel inquiring to [815] bring that out?

Mr. Koch: Yes, your Honor.

The Court: Will you do so now?

Q. That one message you read and the time you gave is the time of transmission or time of receipt?

A. That was the time that the aircraft reported over those positions, and that is Greenwich time. You arrive at Pacific Standard Time by subtracting eight hours.

Q. Making that subtraction, what time would it be?

A. That would be 11:02 P.M., or 2302 Pacific.

Q. Was the flight in the Annette radio range at that time?

A. Would you state that question again?

(Testimony of Gene Kingston.)

Q. Was the flight in the Annette radio range at that time? Was it being controlled by Annette?

A. No, sir, it wasn't at that time. It would be controlled by us a very few minutes afterwards.

Q. Do you find a message in that exhibit that was received at Annette Island advising that the No. 1 engine had been feathered?

A. Yes, sir.

Q. What time was that?

A. 0838 Greenwich. That would be 0038 Pacific. Do you want these times in Greenwich or Pacific?

Q. Greenwich is acceptable. Were there communications between the Annette station and the flight that are not recorded [816] on the exhibit before you?

A. Yes, sir, there were.

Q. Do you recall the contact from the flight to you relative to weather conditions at Annette?

A. Yes, I do.

Q. Will you relate the contents of such message, and your response?

A. Do you want me to read it from the record?

Q. I don't know if it is on that exhibit.

A. There were several discussions about the weather. Part of it is on here; part of it isn't.

Q. You can recite it without reference to that exhibit, if you will.

Mr. Riley: I will object. He can state what he said, but I certainly object to anything they assert the aircraft said, which is not a matter of record, because we are getting into transmissions from the

(Testimony of Gene Kingston.)

aircraft which we cannot cross examine as to the source or content.

Mr. Koch: He can state what messages he received. It is the fact of the reception of the message, not the contents of the message that is important. I am not offering it for the truth of what the message contained, but to show receipt of the message, and there was a conversation in which information was requested and information was submitted, and it is in the very same nature as the [817] messages which have been received in evidence. It just isn't written down on paper that is in this courtroom.

The Court: Do counsel have any authority on this?

Mr. Koch: It is my understanding that the authorities are uniform that where you are not offering it for the truth of the matter contained——

The Court: I have some kind of understanding about it myself, but I wondered if you had any authority you wished to use to influence the Court's thinking upon the subject. I would be glad to have it. If you have not, we will consider it without authorities the best we can.

Mr. Riley: I am sorry, your Honor. I am not prepared in advance on this question.

The Court: The Court overrules the objection and advises counsel that the only purpose for which the Court will consider the evidence is concerning the fact that a message was sent, and not in any way as to what was said in the message so far as the truth of the statement is concerned.

(Testimony of Gene Kingston.)

Mr. Koch: That is the purpose for which it is offered, only.

The Court: I think the better plan would be to frame the question so it would not be asking for the words of the message sender, but merely asking for an indication by him regarding a message seeking information about landing [818] or a message stating information about landing.

Mr. Koch: I will strike the last question.

Q. Did you receive a message from the flight when it was in the general area of Sitka requesting landing information? A. Yes, sir.

Q. What message did you give the flight in response to that request?

The Court: Would it not be more appropriate to say, "Did you give a message intending to assist him in that operation?", or something to that effect?

Q. Did you give a message in response to that inquiry attempting to assist the flight in regard to the respect inquired of? A. Yes, sir.

Q. What was the message which you gave?

The Court: The Court's intention was to avoid saying what he said.

Mr. Koch: This witness can say what he said, can he not?

The Court: Proceed.

A. I gave Northwest Flight 324 Annette Island weather, Sandspit weather, Port Hardy weather.

Q. Do you recall what Annette weather was at that time?

(Testimony of Gene Kingston.)

The Court: As to whether it was closing-in or open weather. [819]

A. The weather at that time was below landing minimums.

The Court: By that, what do you mean? It was such condition as to make not recommended a landing attempt, or does it mean something else?

Mr. Riley: I think that answer should be stricken and he should be required to state what the weather was. The weather is a matter of record already, in documents already in evidence. I think he should state what the weather was, without his conclusions.

Mr. Koch: That wasn't the message he gave.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

A. I recall that the——

The Court: You should say yes or no. Then ask him another question.

A. Yes.

Q. Do you recall whether the Annette Field was open or weathered in?

Mr. Riley: I object. He should state what the weather is, rather than referring to general terms which are, in effect, conclusions.

The Court: The objection is overruled. Answer yes or no.

The Witness: May I have the question again?

(Last question read by reporter.)

A. Yes.

(Testimony of Gene Kingston.)

Q. What was the condition?

A. Weathered in.

Q. Did you advise the flight of that fact?

A. Yes, sir.

The Court: Now, will you advise the Court what you meant by the expression "weathered in", so far as the movement of airplanes to and from the landing strip is concerned?

The Witness: Your Honor, we are furnished with——

The Court: What did it indicate as to the kind of weather that existed on that landing strip as the same was related to the advisability of landing an aircraft there?

The Witness: It was not advisable to land at that time, due to the weather that existed.

Q. Did the Annette radio center have instructions as to what the minimums permitted by the various air carriers were, weather minimums for landing at Annette? Did you have that information there at that time?

A. You will have to state that question again, sir.

Q. Did the CAA radio office at Annette Island where you were located have a record of what the landing minimums were for the various airlines that might use the Annette facilities? [821]

A. Yes, sir.

Q. Did you have such a record of landing and weather minimums for Northwest Airlines?

A. I don't remember.

(Testimony of Gene Kingston.)

Q. Do you know whether or not the weather at Annette Island that night was within the minimums of any airlines whose records you had at Annette?

A. Yes, sir.

Q. What is the answer? A. No.

Q. "No" meaning——

A. They were not within the minimums.

The Court: At what place does that last answer refer to?

The Witness: At Annette Island.

Q. Was the weather below Civil Aeronautics Administration minimums? A. Yes, sir.

The Court: That was at Annette Island, or somewhere else?

The Witness: Yes, your Honor, at Annette Island.

The Court: Do you know in the region round-about Annette what the weather was with respect to landing on the airstrips that were available?

The Witness: Yes, your Honor. [822]

The Court: What was it, if you know, those that were noted by you?

The Witness: Sandspit, I remember the weather.

The Court: You said it was weathered in, as I understand it.

The Witness: Not at Sandspit.

The Court: Where was it?

The Witness: Annette Island only. That is the only place I remember.

(Testimony of Gene Kingston.)

The Court: What was the condition at Sandspit, if you know?

The Witness: 2,500 overcast ceiling, to the best of my memory.

The Court: What does that do with respect to permitting, facilitating or impeding the landing of an airplane at that moment?

The Witness: That wouldn't impede an aircraft.

The Court: You may proceed.

Q. Did you convey that information with respect to Sandspit weather to the flight?

A. Yes, sir.

Q. Did the flight request authority or clearance from your station to go into another control area?

A. Yes, sir.

Q. Was such clearance given? [823]

A. Yes, sir.

Q. To where? A. To Sandspit.

Q. Do you know whether or not the flight contacted the Vancouver control area?

A. Yes, sir.

Q. Did it? A. Yes, sir.

Q. Did you hear the conversation between the flight and the Vancouver control area?

A. Yes, sir.

Q. Did or did not the flight receive clearance from the Vancouver control station to proceed to Annette to land?

Mr. Riley: I object to that.

Mr. Koch: To Sandspit to land, I beg your pardon.

(Testimony of Gene Kingston.)

Mr. Riley: I object to that. He is quoting again from hearsay.

The Court: That objection is sustained.

The Witness: Yes, sir.

The Court: Strike the answer. The Court sustained the objection to that question.

Q. Did you hear a conversation between Vancouver control area and the flight relative to proceeding for a landing to Sandspit?

A. Yes, sir. [824]

Q. Did you receive a message that also went to the flight, clearing the flight to Sandspit?

A. Yes, sir.

Q. Did you receive a message that also went to the flight from Sandspit relative to the plane landing at Sandspit?

The Court: A message from whom? Will you insert that?

Q. From Sandspit.

The Court: Sandspit control station?

Q. Sandspit radio station.

The Court: Read the question with that insertion.

(Question read by reporter as follows:

Q. Did you receive a message that also went to the flight from Sandspit radio station relative to the plane landing at Sandspit?)

A. Yes, sir.

Q. Was the flight to Sandspit authorized at a specific altitude? A. Yes, sir.

Q. Will you examine the exhibit before you,

(Testimony of Gene Kingston.)

A-5, and read the messages that appear on that exhibit which you received or overheard?

A. Message from CAA Yakutat at 0828 Greenwich advises No. 1 engine feathered, proceeding Sandspit, Captain, Northwest Airlines Flight 324.

Advise if landing at Sandspit or proceeding to Seattle. Seattle weather okay. [825]

Q. Have you finished?

A. No, sir, there is quite a number.

Northwest Flight 324, oil cooler No. 1 engine broken, proceeding to Sandspit.

The Court: What was it that broke?

The Witness: The oil cooler on the No. 1 engine.

A. Northwest Airlines Flight 324 southwest Annette 0859 Greenwich, 8,000, estimating over Sandspit 0928 Greenwich.

Q. The rest of them after the accident.

A. Yes, sir.

Q. That is sufficient, then. Did the Annette station direct a NOTAM, a notice to airmen, to Flight 324?

A. Yes, sir.

Q. What did that NOTAM contain?

Mr. Riley: I will object to that unless the witness wants to testify that he did it. It would be hearsay, otherwise.

Q. Did it happen in the vicinity of where you did your work?

A. Yes, sir.

Q. From the same station?

A. The same radio frequency.

Mr. Koch: I think the question is proper, your Honor.

(Testimony of Gene Kingston.)

Mr. Riley: He is talking about a statement that was made by a person other than himself, a message presumably made by a person other than himself to the captain of [826] Flight 324, and it is that I am objecting to. I feel if he made the statement or transmitted the message to the flight, it is all right, I can cross examine him as to it, but if someone else sent it and he is repeating what someone else said, I object to it.

Mr. Koch: They were working in the same place, same facility, and this witness is competent to testify as to what that office did.

The Court: The objection is overruled.

Q. Would you read the question, please?

(Last question read by reporter.)

A. It contained the weather at Sandspit.

Q. Did it contain anything about flare pot lighting of the Sandspit field? A. No, sir.

Q. Did it contain anything about snowbanks along the runways of the field?

Mr. Riley: This is leading the witness.

The Court: The objection is overruled.

A. No, sir.

The Court: Do you recall anything else about any mention of any flight restrictions, any aspects of flight restriction not already mentioned by you?

The Witness: No, your Honor.

Q. Do you recall whether or not it dealt with the braking [827] conditions on the runway?

A. I'm not sure, sir.

(Testimony of Gene Kingston.)

Q. Will you read message K on that exhibit, A-18, top of page two?

Mr. Riley: I will have to object. He is showing the witness the report, accident report of Mr. Smith to Mr. Cox, of which this witness—this report made by Mr. Smith to Mr. Cox, it is an interoffice communication in Northwest Airlines, and it reports a narrative of what happened on that morning; hasn't anything to do with what this witness was doing.

The Court: During whose testimony was Exhibit A-18 admitted?

Mr. Riley: During Mr. Smith's, isn't that right?

Mr. Koch: I don't know. I don't think so.

The Clerk: It was admitted April 9th.

Mr. Koch: Your Honor, it is in evidence. There is one line that contains the Sandspit weather at the time of the accident. I could have read it myself.

Mr. Riley: I will withdraw the objection. Why don't you refer to A-5?

Mr. Koch: I did.

The Court: Proceed.

Q. Will you read——

A. Weather condition at time of accident: Sandspit, 19th, [828] 0920 Greenwich, estimated, ceiling 2500 overcast, visibility 10 miles, temperature 34, dew point 30, wind south-southwest 10, pressure 29.44 inches.

Q. What was the last?

A. 29.44 inches. That is the station pressure in inches, in mercury.

Q. Was there any reference in that exhibit to

(Testimony of Gene Kingston.)

snow at that time? A. No, sir.

Q. Was there any reference to clouds at the 2500 foot level, or anything like that?

A. There is reference to breaks in the overcast.

Q. And 2500, what does that mean?

A. 2,500 foot ceiling. That means the base of the clouds are at 2,500 feet above the surface of the ground.

Q. In the event of an emergency, whose duty is it to alert Air and Sea Rescue facilities or notify the Coast Guard, take that kind of precaution?

A. Air Traffic Control.

Q. That is part of the Civil Aeronautics Administration? A. Yes, sir.

Q. Was an emergency declared by this flight?

A. I don't recall any emergency being declared. I only recall the fact that he reported an engine feathered and the No. 1 oil cooler inoperative or broken.

Q. Did you alert Air Sea Rescue facilities when you heard [829] of the accident?

A. Yes, sir, I did.

Q. What did your alerting of those facilities consist of?

A. We have a crash phone to the Coast Guard area. I picked up the phone and talked to the Coast Guard commander.

Q. What Air Sea Rescue facilities exist at the Coast Guard station at Annette, if you know?

A. Two Grumman Goose amphibious twin-engine airplanes; two eighteen-foot lifeboats.

(Testimony of Gene Kingston.)

Q. Is there any fire-fighting equipment?

A. No, sir.

Q. Is there a fire truck? A. No, sir.

Q. What distance do the rowboats, wherever they are stationed, have to traverse to get to the Annette Island runway?

A. Three and a half to four miles.

Q. Over what kind of terrain?

A. Gravel roads, over muskeg, swampy-type ground, small trees.

Q. Are these Air Sea Rescue facilities, consisting of two rowboats and two amphibian planes, operative at night? A. No, sir.

Q. Is it only daylight Air Sea Rescue service?

Mr. Riley: He is consistently leading the witness.

The Court: Avoid leading the witness. [830]

Q. Will you state when that Air Sea Rescue service is available?

The Court: With reference to time of day, or what?

Mr. Koch: Yes, your Honor.

A. Well, there is a little more to it than——

The Court: Couldn't you say yes or no, and if you don't know, just state that you don't know.

A. Apparently it is available only during the day.

Q. When you did notify the Air Sea Rescue facilities—did you not testify that you did alert them? A. Yes, sir, I did.

Q. Did they alert their facilities at night?

(Testimony of Gene Kingston.)

A. No, sir, they didn't.

Q. When did you contact the Coast Guard facilities?

A. Immediately upon learning that the aircraft in Flight 324 was in difficulty.

Q. When were the facilities alerted, if you know?

A. Within not more than a minute afterwards.

Q. Did the Coast Guard provide any Air Sea Rescue service?

A. No, sir, only to the extent of two rowboats some considerable time later.

Q. Did or did not the Coast Guard refuse to take their airplanes out at night?

A. They refused to do that.

Q. That night? [831] A. Yes, sir.

Q. Do you know whether or not a message from Seattle Flight Control sending weather information to the flight was delivered to the flight?

A. I know that the flight received weather. I couldn't say definitely whether this particular message went to the flight.

Mr. Koch: I have no further questions.

Cross Examination

Q. (By Mr. Riley): You didn't alert the Coast Guard until after the crash, until after you heard of the crash, did I understand your testimony correctly? A. Yes, sir.

Q. And there was no alert to them from the time that Flight 324 reported on the southwest course of

(Testimony of Gene Kingston.)

the Sitka range that it had feathered its engine, is that right? A. Yes, sir.

Q. Would you explain to the Court what we mean when we refer to the southwest course or southwest leg of the Sitka radio range?

A. That is a point where the aircraft passes through that radio beam. It is a geographical location. I don't recall exactly what the coordinates are. [832]

Mr. Riley: Could the witness see Exhibits 6 and A-5?

Q. Have you located the southwest course of the Sitka radio range on the map before you?

A. Yes, sir.

Q. Is that the position at which Northwest Airlines inquired of the Annette weather and at which you relayed the Annette weather, as near as you can tell?

A. Yes, sir, as near as I can tell.

Q. Did Flight 324, after reporting to you that it had feathered its No. 1 engine on the southwest course of the Sitka radio range and was proceeding to Sandspit, did they request any further weather information at Annette after that time?

A. Yes, sir. They asked me if there had been any change in the weather, if it looked like it was going to continue the same.

Q. Would you refer now to Exhibit A-5 before you? I will ask you to refer to the last message commencing on the bottom of page 1 of Exhibit A-5, and ask you did you transmit that message to

(Testimony of Gene Kingston.)

Northwest Airlines Flight 324 on the morning of January 19, 1952?

Mr. Koch: I wonder if the message could be read. I don't know what it is.

Mr. Riley: I will ask him to read it if he states he transmitted it. [833]

Q. Did you transmit that message?

A. No, sir.

Q. Do you know from looking at this flight position log who did transmit it?

A. Annette Island transmitted the weather.

Q. Were you the only radio operator on duty at this time? A. No.

Q. Would you state what the transmission commencing at the bottom of page 1 is? Read it, interpret it, beginning on page 1 and continuing to the top of page 2.

Mr. Koch: Your Honor, the witness just said he didn't send it. The message itself will speak for itself. When he says "No", he still asks him to read it.

The Court: The objection is overruled.

A. Sandspit broken to overcast, occasionally light overcast, one mile, light snow.

Q. That transmission is continued, isn't it? Would you read the entire message as it is set forth? A. Port Hardy—

Q. Commencing the last message, including the heading, bottom of page 1.

A. Annette—I can't quite make out this other part—to Northwest Flight 324-17, terminal forecast

(Testimony of Gene Kingston.)

your arrival time. Sandspit broken to overcast, occasionally light overcast, visibility one mile, light snow. Continued on [834] the second page.

Q. To the end of that message, please.

A. Port Hardy, 300 overcast, occasional light rain, light snow.

Annette, 1,500 broken ceiling, occasional visibility 7 miles—correction. It is 1,500 broken, occasionally 700 obscured, visibility one mile, light snow showers. Comox—I don't recall this particular designation, WYJ, with the next two letters, broken.

Seattle-Tacoma, 2,000 broken, clouds 4,000—that is the terminal—overcast.

Portland, 1,200, overcast.

Signed, Seattle meteorologist, that is, Northwest Airlines, filed 191249 Pacific Standard Time.

Q. Does that filing statement indicate the time you would have transmitted the message?

A. I didn't transmit the message.

Q. From the time it was transmitted?

A. At the bottom of the message, 191249 PST would indicate the time the message was filed, yes.

Q. What time Pacific Standard Time was the message transmitted? A. 12:49.

Q. After the crash, isn't it a fact that several aircraft, at least, one aircraft, landed at Annette to pick up emergency equipment and supplies to take to Sandspit? [835] A. Yes, sir.

Mr. Riley: That is all the questions I have, if the Court please.

(Testimony of Gene Kingston.)

Redirect Examination

Q. (By Mr. Koch): Do you know whether or not that terminal forecast was delivered to the flight?

A. I don't recall definitely that this particular message was. I know that Northwest received forecasts for Sandspit and Annette Island. I can't recall the message numbers, because they don't give that over the air to the pilot.

Q. If that message was transmitted at 12:49 A.M. Pacific Standard Time, I wonder if you would check that exhibit A-5 to familiarize yourself with delays and other messages that were transcribed, and then answer, if you can, when that message might have been delivered, might reasonably have been expected to have been delivered to the flight, if it was delivered at all.

A. These forecasts I know were delivered to Northwest Flight 324 at the first of the difficulty, when he advised that his engine was inoperative and the oil cooler was broken.

Q. I am talking about this particular terminal forecast. I want to know about what the time lag would be from [836] transmission to receipt, if this particular one was received.

A. In other words, you want me to—I couldn't estimate.

The Court: We want you to do something to speed up this examination.

A. I couldn't estimate exactly when the pilot would receive this just by looking at the time.

(Testimony of Gene Kingston.)

Q. What is the usual time for transmission of a message? A. Just a very few minutes.

The Court: This is redirect examination, is it not?

Mr. Koch: Yes, your Honor.

The Court: Bring it to a close speedily, please.

Q. Can you, referring to that map which is Plaintiffs' Exhibit 6, estimate where Northwest Flight 324 of the 17th would have been when that message would have been delivered, if it was, with reference to the map?

A. I would estimate in between southwest Dickson and southwest Sitka.

Q. How far from Sandspit?

A. I would say about 70 miles.

Q. How far from Annette Island air base?

A. From Annette, approximately the same distance.

Q. About equidistant? A. Yes, sir.

Mr. Koch: I have no further questions. [837]

The Court: Is there anything further?

Mr. Riley: No, your Honor.

The Court: You may step down. Call the next witness.

(The witness was excused.)

PAUL H. SANDERS

called as a witness by defendant, was sworn and testified as follows:

Mr. Riley: Before the questioning of this witness, I wish to call the Court's attention to the first

(Testimony of Paul H. Sanders.)

day of this trial and defendant's motion to quash subpoenas issued to Northwest Airlines, and particularly that subpoena which was issued to Northwest Airlines by one Mr. Paul H. Sanders, who is the—I have forgotten his title. Counsel took the position that Mr. Sanders was not within the jurisdiction of this Court. The fact of the matter is that Mr. Sanders has been in this courtroom every day of this trial, and the Court indicated that if Mr. Sanders was not in the jurisdiction of this Court, within 100 miles, that the subpoenas would not be enforced and that Mr. Koch's objections thereto would be sustained. Now, after Mr. Sanders having sat in here every day of this trial, plaintiffs having been denied the right to have offered his testimony at a part of their case in chief, I [838] believe the defendant should be precluded from using Mr. Sanders as their own witness in rebuttal to the plaintiffs' case.

Mr. Koch: Your Honor, that is a not unexpected misstatement. The discussion at the outset of this case was solely related to whether or not the subpoenas served on the statutory agent for Northwest Airlines were effective to compel the attendance of Mr. Judd, Mr. Sanders, Mr. Curry, Mr. Middlestat, and other persons who are stationed at the home office in Minneapolis.

The Court: The objection is overruled, with the privilege of opening up plaintiffs' case in chief, if and when, for the purpose of asking this witness some question which he is not permitted to ask on

(Testimony of Paul H. Sanders.)

cross examination, which question or inquiry the Court deems, upon being advised, is material to the plaintiffs' case in chief. You may have that right reserved with like effect as if he had been here and you had called him to the witness stand.

Mr. Riley: May I state again, for the record, Mr. Koch's objection at the time was that these witnesses were outside the 100 mile limit.

Mr. Koch: My objection was his subpoenas were not effective to compel his attendance. Mr. Sanders has been here. Mr. Riley has seen him a hundred times and didn't [839] even inquire as to his identity. He could have done so at any time.

The Court: Please let bystanders not indicate approval or disapproval, pleasure or lack of pleasure in statements made by those connected with the trial. You may proceed.

Direct Examination

Q. (By Mr. Koch): Will you state your name, please? A. Paul H. Sanders.

Q. And your address?

A. 7208 James Avenue South, Richfield, Minnesota.

Q. What is your present employment?

A. I am presently employed by Northwest Airlines as director of line maintenance and ground services.

Q. Were you employed by Northwest Airlines on January 19, 1952? A. Yes, I was.

(Testimony of Paul H. Sanders.)

Q. How long have you been employed by Northwest Airlines? A. Since 1949.

Q. And how long have you been engaged in the field of aviation?

A. Exclusively since June, 1932.

Q. Will you relate your previous duties and experience in the field of aviation?

A. For a number of years, actually from 1932 until 1937, I [840] worked in the Experimental Division of the Glenn L. Martin Company in Baltimore, Maryland. Subsequent to that, I was employed by the same company as a service engineer assigned for duty with the Royal Air Force, British Royal Air Force, the French Air Force, South African Air Force, and in the latter days of World War II, with the United States Air Force and the United States Navy.

Q. What were your duties with the Air Forces of those various governments?

A. To assist them in putting airplanes into service, crew training, mechanical training for their maintenance units, accident investigation, general all around service engineering type of activities.

Q. What is your present position with Northwest Airlines?

A. Director of line maintenance and ground services.

Q. What was your position on January 19, 1952?

A. I was assistant manager of the Inspection Division.

Q. Did you participate in the investigation of

(Testimony of Paul H. Sanders.)

the accident occurring to Flight 324 of the 17th, of January 19, 1952, operated by Northwest Airlines?

A. Yes, I did.

Q. Have you participated in the investigation of other aircraft accidents prior to and subsequent to the subject accident? A. Yes, I have. [841]

Q. Does your accident investigation experience include accident investigations of aircraft other than Northwest Airlines accidents?

A. Considerable experience in the investigation of military accidents.

Q. In connection with the investigation of this accident, were you assigned to take part in the investigation in an official capacity? A. Yes.

Q. By whom? A. In the Sandspit accident?

Q. Yes.

A. Yes, I was assigned to assist the Civil Aeronautics Board in the investigation of this particular accident by Northwest Airlines.

Q. When did you arrive at Sandspit?

A. My recollection of the date is January 20th. However, it was a Sunday afternoon following the accident, which I believe occurred early Saturday morning, and this happened to be late Sunday afternoon following the accident.

Q. Did you inspect the aircraft?

A. As much as was possible under the circumstances.

Q. Can you estimate how far the aircraft was located from the south end of the runway?

A. It is my guess, or my recollection, that the

(Testimony of Paul H. Sanders.)

aircraft was [842] something in the vicinity of half a mile from the beach.

Q. From your investigation, had the aircraft withstood the impact of the water well?

A. Yes, I think it had.

Q. Was there or was there not substantial damage apparent?

A. Well, there was some fairly substantial damage apparent to the left wing of the aircraft, the left outer wing of the aircraft. There was some damage to the nose of the aircraft. Of course, during the ensuing three or four days, additional damage was done by the changing of the tide, but at the time, this is the damage that I recall. This was the day we arrived.

Q. Was any attempt made to tow the aircraft?

A. Prior to my arrival, apparently there had been an attempt made by some individuals on the scene to try—to attempt to beach the airplane by towing it around the point, so-called, Sandspit Point.

Q. Were they able to do that?

A. I think they were successful in moving the airplane a slight distance, but not other than that.

The Court: Why couldn't it be moved by normal efforts?

The Witness: The equipment was not available, I think, at the time to move it.

The Court: Was the terrain over which it might have been moved, aside from the condition of the water, agreeable [843] to moving it?

(Testimony of Paul H. Sanders.)

The Witness: No. The presence of a bunch of large rocks in this area would have precluded moving it very far.

The Court: How far below the surface was the top surface of those rocks, if you know?

The Witness: Depended on the tide. Some of them were out of water at low tide.

Q. Was it moved any closer to shore by the attempted towing?

A. I cannot tell you that, because I do not know the direction that they attempted to tow it, except it was my understanding that they attempted to move it closer towards the point east of the airport.

Q. During the course of the inspection, was the nose gear assembly found? A. Yes.

Q. Was it available for an inspection?

A. I think the—about two days prior to my arrival there, the nose gear assembly washed up on the beach. It was pretty well intact, and it was available for inspection.

Q. What facts were disclosed, if you recall, from your examination of the nose gear at that time?

A. There were some pretty evident things by an inspection of the nose gear. The predominant one was that the nose gear was somewhere in the general vicinity of its up and locked position at the time the aircraft had hit the water. This [844] fact was established by markings on the up lock attachment of the gear itself.

Q. Were you able to tell from your inspection

(Testimony of Paul H. Sanders.)

whether or not the pilot had attempted gear retraction prior to the accident?

A. The fact that the gear was in the up position, in some general area of up, would indicate that the gear had been retracted or started to retract.

Q. Was that observation confirmed or refuted by the inspection made by divers who went underwater?

A. Yes. Sometime during the ensuing week, we secured the assistance of some RCAF, Royal Canadian Air Force divers, and at my direction one of these divers checked the two nacelles on the aircraft, and which the two main landing gears are stowed when they are retracted, and the observations there indicated that both of these landing gears were in the nacelles, in the up position.

Q. Are the main landing gears connected in any way with the nose gear on a DC-4?

A. The three gears are operated by the same hydraulic system, and by the same hydraulic control.

Q. Does the same lever in the plane retract all the gears?

A. The control available to the pilot, the landing gear lever controls all three gears, and by placing it in the up position, the three gears would start to move towards the [845] up position.

Q. In what order do the gears retract?

A. On the DC-4, the nose gear tends to retract because of its smaller size and less resistance, tends to retract at a slightly faster rate than the two main gears. It is a matter of two or three seconds

(Testimony of Paul H. Sanders.)

difference in which the nose gear reaches the up position, several seconds before the two main gears.

Q. From your observation, can you conclude, or would you not, should one find that because the main gear had reached the up position, that the pilot had attempted to retract the nose gear?

A. It is my opinion that the pilot had attempted to retract the landing gear. It would be fairly obvious, with the facts that were available to us at the time of this investigation, that that attempt had been made and was generally successful because the gear was in the up position.

Mr. Riley: I would like to know what all this has to do with the accident. As a pilot, I can testify any pilot in his right mind would have attempted to pull this landing gear.

The Court: The objection is sustained.

Mr. Koch: We are attempting to show through this witness what caused the plane to fail to successfully take off from the airstrip. [846]

The Court: It is enough he has said what he has found. Let the Court draw the deductions therefrom.

Q. What were you able to observe with respect to the runway and field conditions at Sandspit?

A. The landing strip, the runway at Sandspit at the time of our arrival there, was lined by a windrow of snow on either side that had completely covered the normal electric runway boundary lights. There was still considerable snow and slush, frozen

(Testimony of Paul H. Sanders.)

slush, at this time on the runway. The runway at this time was lighted with oil-burning flares.

Q. How high were these windrows of snow?

A. They varied from two to four feet, I'd say.

Q. How wide is the runway?

A. The normal width of the runway is 150 feet. The windrows of snow were inside of those perimeters.

Q. How much of that 150 feet did the snowbanks and lights take off?

A. Somewhere between 10 and 15 feet they would have taken up, total.

Q. On each side?

A. I would say from 7 to 8 feet on each side.

Q. Was there only one runway at this airport?

A. It is a single runway.

Q. Do you recall the length of the runway?

A. Yes, 5,150 feet. [847]

Q. Is this runway sufficient in length for a DC-4 to land?

Mr. Riley: I object. I don't think he is qualified as a pilot.

Mr. Koch: I don't understand that you have to be a pilot to know the propensities of an airplane.

The Court: Is he speaking for the owner? Is he the highest-ranking owner you expect to call as a witness?

Mr. Koch: Yes, your Honor.

The Court: The objection is overruled. Read the question.

(Last question read by reporter.)

(Testimony of Paul H. Sanders.)

A. Yes.

The Court: The answer was heard by the Court as "Yes."

Q. Would the condition with respect to the runway width and length and the fact that there was snow on the runway present abnormal conditions, in your opinion?

A. I would consider them abnormal.

The Court: I am going to have to make an order next week relating to your constantly referring to your notes and waiting an unreasonably long time in between questions. You are going to have to expedite these examinations. Since the trial began, you could have familiarized yourself enough with the questions you wanted to ask witnesses without referring to notes. You are not entitled to [848] refer to notes every time you ask a question, before you go on to the next one.

Q. How did the field conditions as you observed them affect the ability of the plane to stop at the time the attempted landing was made?

A. Well, the slush, the snow and slush on the runway would definitely affect the aircraft's ability to come to a stop. The narrowness of the runway would also be an affecting factor.

Q. Was there risk, in your opinion, of veering into a snowbank or otherwise having a landing accident that might have accounted for the decision to go around?

A. With the weather conditions that were prevalent, along with the physical conditions on the run-

(Testimony of Paul H. Sanders.)

way, there is a good possibility the airplane would want to weather cock into the southwest wind that was blowing. Coupled with the narrowness of the runway, there would be a possibility of running into a snowbank.

Q. Would this have an effect on the pilot's decision to land or take off?

A. Yes, it would.

Q. What would the effect be?

A. In order to keep the airplane heading straight down the runway, he would have to apply differential power and braking and use nosewheel steering. This type of action uses up more [849] runway. The pilot may elect, because of that, to take off or to increase power so he can retain directional control and make another takeoff.

Q. What were the risks incident to the attempted go-around?

A. I didn't follow your question.

Q. He weighed those risks of a landing accident, I would assume, against possible risks in attempting to make the plane airborne again?

A. Yes.

Q. What were those risks?

A. Generally speaking, there weren't any. The attempt or the decision to go around again would be a fairly normal decision under the circumstances, because——

Mr. Riley: If your Honor please, I would like to object. Is this witness a pilot?

The Court: Sustained.

(Testimony of Paul H. Sanders.)

Q. In reaching his decision, would the pilot have any assistance from Civil Air Regulations, and particularly Part 41 of those regulations?

Mr. Koch: Will you hand the witness Plaintiffs' Exhibit 33?

A. Would you repeat the question?

(Last question read by reporter.)

A. Well, in reaching his decision to land at Sandspit——

The Court: Will you answer yes or no? [850]

A. Yes.

Q. Will you state what that assistance was, or what guidance he had?

A. Part 41, as it was written at the time, required the pilot to land at the nearest suitable airport.

Q. In attempting to go around, what are the steps the pilot must take?

Mr. Riley: I object. This man has not been shown to be a pilot. I don't see how he can tell.

The Court: The objection is sustained.

Q. Did you find evidence in your investigation that the flaps had not been retracted?

A. No.

Q. Are DC-4's designed to operate and take off on three engines?

A. They are certified to operate, take off, on three engines.

Q. What happened during the course of the flight of 324 of the 17th from Anchorage to Mc-

(Testimony of Paul H. Sanders.)

Chord Field which caused the pilot to change his flight plan?

Mr. Riley: I object. He is leading the witness. I realize it takes up the Court's time, but I don't think he should be permitted to lead the witness.

The Court: Avoid leading. Ask him for his information.

Q. Do you have any information as to the circumstances which occurred during the course of the flight which resulted in the Sandspit landing, or attempted landing? [851] A. Yes.

Q. Will you state what that is?

A. Flight advised somewhere between Anchorage and Sandspit that they were feathering No. 1 engine because of a failed oil cooler. This necessitated shutting down the No. 1 engine and proceeding on three engines.

Q. What is the effect of a broken oil cooler?

A. No. 1 effect is the loss of engine oil.

(Four photographs marked Defendant's Exhibit A-31 for identification.)

The Court: What kind of object do those photographs purport to reflect?

Mr. Koch: It is the engine and the oil cooler.

The Court: Are these a series of photographs of the No. 1 engine and its corresponding oil cooler?

Mr. Koch: Yes, your Honor.

The Court: They are four in number, all marked as one exhibit, is that your understanding?

Mr. Koch: Yes, your Honor. I ask that they be handed to the witness.

(Testimony of Paul H. Sanders.)

Q. Will you please explain what those pictures are? A. These are photographs.

Q. Of what?

A. Of a No. 1 engine on a DC-4, showing both the engine and the oil cooler and the oil cooler cowling. [852]

Q. Were certain of those pictures, looking top to bottom, taken from the cockpit?

A. Yes, I think with one exception they were taken from the cockpit. There is one here that seems to be a view from the other side of the engine.

Mr. Koch: I offer them, your Honor, for illustrative purposes.

The Court: Any objection?

Mr. Riley: No objection, your Honor.

The Court: Admitted, to illustrate the witness' testimony.

(Defendant's Exhibit A-31 for identification received in evidence.)

Q. Even though the pilot said that there was a broken oil cooler, is there any way to determine whether this is a guess or whether it could have been based on fact?

The Court: Answer yes or no.

A. Yes.

Q. How could you tell that?

A. Well, the oil cooler, its regulator and oil temperature control mechanism are pretty well confined in a stainless steel shroud, of which the oil cooler scoop is a part of. Evidences of oil leakage in that area would indicate the oil cooler or some

(Testimony of Paul H. Sanders.)

of its attendant plumbing and controls was where the oil leakage was coming from. [853]

Q. Do you know whether or not this could have been determined by the pilot, flying at night?

A. From the——

Mr. Riley: I object. I think we are going to ask a man who is not a pilot.

The Court: Answer yes or no.

A. Yes.

Q. Will you explain your answer, if you can?

The Court: The objection is overruled.

A. The evidence of oil leakage in the general vicinity or the immediate vicinity of the oil cooler would indicate to the pilot that something within the oil cooler cowling was leaking oil.

Q. Can that be observed at night?

A. That can be observed at night through the use of the Aldis lamp carried on board or through the use of the wing lights which illuminate the engines and leading edge of the wing.

Q. Would the loss of oil be apparent from indicators in the cockpit?

A. It would be apparent if it were of sufficient magnitude; it would become apparent on the oil quantity gauge for the particular engine involved.

Q. What kind of damage is produced by an oil cooler failure?

A. Well, an oil cooler failure in which the [854] engine is allowed to continue will eventually result in damage to the engine, a possible overspeed on a propeller or an uncontrollable propeller, which

(Testimony of Paul H. Sanders.)

would seriously handicap the pilot's ability to fly the airplane.

Q. Do you know whether or not these possible things could have taken place in flight?

A. Yes.

Q. Could the damage that resulted from this oil cooler have been detected by careful inspection at Elmendorf in Anchorage? A. No.

Q. Do you know whether or not the oil cooler was inspected at Elmendorf? A. Yes, it was.

Q. Is there a Northwest procedure and a CAA regulation directing when oil coolers shall be overhauled? A. Yes.

(Manual reference page marked Defendant's Exhibit A-32 for identification.)

(Manual reference page marked Defendant's Exhibit A-33 for identification.)

(Manual reference page marked Defendant's Exhibit's A-34 for identification.)

The Court: Let opposing counsel see those.

Q. What is what has been marked A-32? [855]

The Court: If you know.

A. I do know. This is a copy of a manual reference page from Northwest Airlines mechanical manual, Volume D, covering engine changes.

Q. Does that exhibit deal with overhaul of oil coolers?

A. No, this exhibit concerns itself with engine changes and the work necessary at the time of an engine change.

(Testimony of Paul H. Sanders.)

Q. Does an engine change include the change of the oil cooler? A. Yes.

Q. How often is it required to change the engine and oil cooler?

A. Scheduled engine changes and oil cooler changes are 1,500 hours.

Q. Do you have before you A-33? A. Yes.

Q. Do you know what that is?

A. This is another manual reference from Northwest Airlines mechanical manual, Volume D, covering inspection procedures as they affect DC-4 engine installations.

Mr. Koch: I will offer A-32 and A-33 in evidence.

Mr. Riley: No objection.

The Court: Admitted.

(Defendant's Exhibits A-32 and A-33 for identification received in evidence.)

Q. With respect to A-33, how often are oil cooler inspections had? [856]

A. Oil cooler inspections are inspected on a daily basis. They are also inspected as part of the basic power package at each 100 hour and number check.

Mr. Koch: May the witness have Exhibit A-34?

Q. If you know what that is, will you state it?

A. This is another manual reference from Northwest Airlines mechanical manual, Volume D, covering fuel and oil systems on DC-4 aircraft.

The Court: Which one?

The Witness: A-34.

(Testimony of Paul H. Sanders.)

Q. What is significant with respect to oil coolers in that exhibit?

A. This manual reference covers the removal and installation and repair of oil coolers.

Mr. Koch: I will offer it in evidence.

Mr. Riley: May I ask the witness a couple of questions?

The Court: You may.

Mr. Riley: That commences at page 3 of the oil system section of the Northwest Airline manual, doesn't it?

The Witness: That is correct.

Mr. Riley: Pages 1 and 2 are missing?

The Witness: Page 2 is attached to the back of page 3.

Mr. Riley: Where is page 1?

The Witness: Page 1 is not here, as I see it. [857] There is an additional page here, on reference the same manual, covering repair of oil coolers. Page 1 is not here.

Mr. Riley: The document is incomplete, if the Court please. I object to it, accordingly.

Mr. Koch: We have only produced the records that are relevant to the case. If page 1 had anything to do with oil coolers——

The Court: The objection is overruled. Defendant's Exhibit A-34 is now admitted.

(Defendant's Exhibit A-34 for identification received in evidence.)

The Court: Will the witness please look at A-33 again and repeat for my convenience what he has

(Testimony of Paul H. Sanders.)

already said, or should have said, the thing is?

The Witness: It is a manual page from mechanical manual, Volume D, covering power plant inspection procedures.

The Court: That means an engine inspection, does it not?

The Witness: Yes, sir.

Q. Is the oil cooler a separate unit?

A. Yes, it is.

Q. Would malfunctioning of the engine have any effect on the oil cooler attached to the engine?

A. No. [858]

Q. Would malfunctioning of an oil cooler have any effect on the engine? A. Yes, it would.

Q. Can you explain your answer?

A. Well, malfunctioning of the oil cooler would cause a subsequent engine failure if proper procedures were not effected at the time the malfunctioning was discovered.

Q. Was the type and style of the oil cooler on this flight a standard type used on DC-4 aircraft?

A. Yes.

Q. What did the Northwest Operations Manual and CAA regulations provide at the time of the accident with respect to action to be taken when a four-engine aircraft loses an engine?

A. The aircraft was to proceed to the nearest suitable airport and effect a landing.

Q. With respect to maintenance requirements, is there any difference between scheduled flights and contract flights?

(Testimony of Paul H. Sanders.)

A. No. They were both conducted under Part 41.

Q. Do you know whether or not the prescribed emergency gear on Flight 324 of the 17th was on the plane when it left Seattle? A. Yes.

Mr. Koch: May the witness have the pre-flight inspections, A-29 and A-30? [859]

Q. Is A-29 the pre-flight inspection at Seattle?

A. Yes, it is.

Q. Does that exhibit show that the emergency gear was aboard when the flight departed Seattle?

Mr. Riley: Mr. Koch is consistently leading the witness.

The Court: The objection is sustained.

Q. Can you state whether or not that pre-flight inspection establishes a check of emergency gear upon departure? A. Yes.

Q. Might that gear have been removed en route at Tokyo, Shemya or at other points?

Mr. Riley: Same objection, if your Honor please. He is continually leading him.

The Court: Avoid leading.

Q. Was it the practice or was it——

The Court: “What have you to say is the practice, if there was any, regarding such and such situation or thing?” That would be one way.

Q. What would you say with respect to the practice of the maintenance department with respect to removing emergency gear or other gear from the plane from time to time during the course of a round trip flight?

A. Well, it would be entirely possible for the

(Testimony of Paul H. Sanders.)

military to give us a load, in effect, that was a [860] cargo load, and which would necessitate removal of seats, life rafts, life vests, at such a point as Tokyo.

Q. Does A-30 indicate whether or not the same emergency gear that was on board when the flight left Seattle was still on board when the flight left Anchorage for Seattle on the return leg?

A. Yes, it does.

Q. Does the manual prescribe a regular inspection of the emergency equipment? A. Yes.

Q. How is it possible to determine when life vests must be changed?

A. By calendar date which is carried on the container of each life raft and life vest. These dates are reviewed at the departure of every flight, at the origination of every flight, and on the basis of their dates, they are either removed for inspection or it is determined they are OK to continue.

Q. How often is inspection required?

A. This type of inspection is required at the origination of each flight.

Q. I mean on the date that appears on the life vest itself.

A. Semi-annually, or to be checked if the life vest was subjected to any use during the period.

Q. How can you tell whether it was subjected to use? [861]

A. They were in sealed containers, containers which had a small seal across the connection, across the clasp that held the container closed. If that seal

(Testimony of Paul H. Sanders.)

was broken at any time during a trip, the life vest was removed and subjected to a complete inspection.

Q. Do you know how often inspections were made with respect to the dates or whether or not the seals had been broken?

A. Prior to each flight origination.

Q. What kind of inspection was provided with respect to the life rafts?

A. The life rafts were subjected to pretty much the same type of regulation. They, too, carried an identifying tag with a date on it, an inspector's stamp on that tag. They were inspected for the same type of thing. If the seal was broken, the life raft was removed and re-inspected completely.

Q. Now, with respect to maintenance of the aircraft, what procedures were invoked by Northwest Airlines on general engine and working part maintenance?

A. The maintenance procedures and program effected by Northwest Airlines is that which is pretty well described by CAR's, with routine inspections being performed as required by law.

Q. What is required by law with respect to periodic inspections? [862]

A. Those times will vary with each given airline. However, for Northwest Airlines at this time, the DC-4 aircraft was set up on an inspection required every 100 hours.

(Maintenance check marked Defendant's Exhibit A-35 for identification.)

(Testimony of Paul H. Sanders.)

Mr. Koch: May I have the exhibits from the pre-trial order which have not been introduced yet, defendant's exhibits?

The Court: If you have more exhibits, bring them out now and let them be marked.

(Copy of letter marked Defendant's Exhibit A-36 for identification.)

(Copy of letter marked Defendant's Exhibit A-37 for identification.)

(Letter marked Defendant's Exhibit A-40 for identification.)

(Service record marked Defendant's Exhibit A-41 for identification.)

The Court: Where are A-38 and A-39? Have they been previously marked?

Q. With respect to the emergency gear on Flight 324 of the 17th, were inspections made when the flight left Tokyo?

Mr. Riley: He is leading the witness again.

The Court: Avoid leading.

Q. Do you know whether or not inspections [863] were made when the flight left Tokyo?

A. Yes.

Q. And when the flight left Shemya?

A. Yes.

Mr. Koch: I want to identify these exhibits.

The Court: What is 36, if you know, A-36?

The Witness: A-36 is a true copy of a letter.

The Court: Relating to what subject, if you know?

(Testimony of Paul H. Sanders.)

The Witness: Relating to maintenance reports on ship 601.

The Court: Is there any objection?

Mr. Riley: Each and every one of these remaining documents, A-36-41, were prepared after the crash, are self-serving declarations, are not the records of the maintenance. As to A-36, was not that report prepared after the crash, to report from other records what the other records showed?

The Witness: Yes.

Mr. Riley: And it was prepared as a report having to do with the investigation of the crash, after the crash?

The Witness: It was prepared as part of the investigation of the crash.

Mr. Riley: Isn't it true that each of the other documents, A-37-A-41, were also rendered after the crash as a part of the report and are not original [864] records of maintenance prior to the crash?

The Witness: A-39 is a report by a captain who flew this particular airplane prior to its departure from Anchorage.

Mr. Riley: Isn't the report rendered after the crash?

The Witness: Yes, it is.

Mr. Koch: Your Honor, I would like to ask some questions which will establish the admissibility of these exhibits.

The Court: You may do so.

Q. Where are the originals of the records of

(Testimony of Paul H. Sanders.)

which this information purports to be extracted by these offered exhibits?

A. The original maintenance record of the airplane, the original record as far as the aircraft is concerned, went down with the airplane. It was part of the ship's log.

Q. What is Northwest Airlines required by the CAB to do, if you know, with respect to the aircraft log carried aboard the aircraft?

A. We are required by law to carry the log on the airplane and to leave certain copies, in this case, to leave certain numbers of log pages on board the airplane.

Q. Are the pages eventually removed from the airplane?

A. They are removed at stations such as [865] Seattle.

Q. What becomes of those removed log pages?

A. They are returned to St. Paul, to the Records Section.

Q. Is that information on the log page recorded in St. Paul, do you know?

A. Sometimes; not as a standard procedure. Sometimes they are.

Q. Are the log pages kept in St. Paul?

A. The log pages are maintained.

Q. Are they ever disposed of? A. No.

Q. Are you required to keep such records?

A. By law, we are required to keep such records.

The Court: That is true when the airplane is in service, is that right?

(Testimony of Paul H. Sanders.)

The Witness: That is correct.

The Court: What is the ruling, if any, regarding conduct of a similar nature respecting any matter and thing concerning the aircraft after it is destroyed?

The Witness: We are required to retain them for three years.

Q. With respect to the log pages that went down on the airplane, do you know whether or not the CAA requires reports of the nature in your possession to be prepared and submitted?

A. Yes, the CAB requires reports such as this nature to be submitted in cases where log pages are lost aboard an aircraft. [866]

Q. Do those records supplant the aircraft log and the company file of this aircraft?

A. These are records of the work done and signed for in the aircraft log at the time it passed through these stations.

The Court: Concerning matters and things occurring when with reference to the crash landing of this airplane Flight 324?

The Witness: These are items of a maintenance nature that were performed prior to the accident on the flight that the accident occurred on.

The Court: And not afterwards, is that right?

The Witness: And not afterwards.

The Court: Does any one of those records reflect any matter or thing which came into being or occurred subsequent to the crash landing of the aircraft?

(Testimony of Paul H. Sanders.)

The Witness: These are reports——

The Court: Answer yes or no.

The Witness: Yes, sir.

The Court: Does any one of them, A-35 to A-40 inclusive, reflect any information which came into being only after the crashing of the airplane?

The Witness: These reflect information that was known at the time.

The Court: I am trying to see if any one of them concerns any matters which occurred after the crash. [867].

The Witness: No, sir. These are all matters that occurred before the crash.

The Court: Did they relate to the servicing of the aircraft?

The Witness: They did.

The Court: You may inquire.

Mr. Koch: I think you completed it, your Honor.

The Court: Is there any objection?

Mr. Riley: Yes, your Honor, because each one of these is identical to the same things we objected to yesterday. They are not original maintenance records. These are extracts from other records, and the extracts are made after the date of the accident.

The Court: Where are the originals, Mr. Sanders?

The Witness: Two of these appear to be originals signed by, one, the chief mechanic in Anchorage; and, two, the chief mechanic in Tokyo.

The Court: These are in your company's files,

(Testimony of Paul H. Sanders.)

the original of this paper in each case, A-35, A-36, A-37, A-38, A-39 and A-40?

Mr. Koch: These that aren't originals are covered by the stipulations saying the copies may be substituted. As for the information itself, they were on the log. That was not recovered after the accident.

The Court: If all of the things which are in [868] question had originally been made, one by the ribbon impression on a typewriter, and the others by carbons of the ribbon impression—is this one of those copies? That is what I want to know, or is this a digest, a summary, or something that was made to convenience somebody after this airplane was lost?

Mr. Koch: I think I can answer you this way——

The Court: From the witness.

Q. Do those letters purport, if you know, to extract the information that was on the log that went down with the airplane? A. Yes.

The Court: This trial is continued until next Tuesday morning at 10:00 o'clock, subject, however, to calling counsel and the parties back before this Court to resume the trial proceedings earlier if the Court should finish other business on Monday.

(Brief discussion among Court and counsel re length of trial.)

The Court: You are excused until 10:00 o'clock Tuesday morning.

(Recess.)

Mr. Koch: Your Honor, at the close of court

(Testimony of Paul H. Sanders.)

Friday, the Court had before it for consideration the admissibility of Exhibits A-36, A-37, A-38, A-39 and A-40. [869]

The Court: Yes, they were marked very near the close of the proceedings.

Mr. Koch: Yes, your Honor. At this time, I wish to withdraw from the Court's consideration A-36, because it is identical with A-37, and it was a matter of inadvertence on the part of counsel.

The Court: Do you like the appearance of A-37 as something better to work with than A-36?

Mr. Koch: Yes, your Honor. A-37 is the original, and A-36 is the copy.

The Court: The Court approves that choice. Is there any objection to this withdrawal?

Mr. Riley: No objection to the withdrawal, your Honor.

The Court: A-36 is now withdrawn and returned to counsel who produced it, and I ask the clerk to delete the clerk's file marks. You may now proceed.

Mr. Koch: I will ask Mr. Sanders to resume the stand. May these exhibits be handed to Mr. Sanders?

Q. Mr. Sanders, referring to Exhibit A-37, will you explain to the Court how this was made, and from what source the information which it comprises came?

A. This particular document is a report from the Anchorage line maintenance station, and was necessitated by the fact that the logbook for the

(Testimony of Paul H. Sanders.)

airplane involved in this accident was lost on board the airplane. [870]

The Court: Referring to what exhibit number?

The Witness: A-37.

The Court: It would be helpful if you would keep your voice raised clear and distinct so all present can hear you.

A. As I stated, the aircraft logbook was lost with the airplane. In order to keep our records which we are obligated to keep on each aircraft, the activity report from each of the stations handling the airplane on the flight involved were saved and a report made from each of those stations on work performed on the airplane, maintenance performed on the airplane, that their activity reports indicated they had done.

Q. Who was the report made to?

A. This is a report made to the superintendent of line maintenance, St. Paul, by the chief mechanic at Anchorage.

Q. What is the use made of that material submitted to the St. Paul office?

A. This is a means of keeping the maintenance record on this particular airplane, because the logbook, which is the maintenance record, was not available.

Q. Do you know whether or not the information corresponds to information either in the mechanic's logbook at the station involved, or from the pilot's logbook, the log carried on the plane? [871]

(Testimony of Paul H. Sanders.)

A. Ordinarily, the information is an excerpt from the logbook.

Q. Which logbook?

A. From the aircraft logbook. It would include the pilot's comments and corrective maintenance action, if taken.

Q. What were the last log pages on this airplane received in St. Paul, if you know?

A. To the best of my knowledge, they were log pages covering the trip prior to January 15, I believe, the in-bound trip into Seattle prior to the out-bound trip off of which this accident occurred, somewhere in the early part of January.

Q. To what extent is the testimony you have just given with respect to A-37 applicable to A-38, A-39 and A-40?

A. They are identical reports from other stations handling the aircraft involved; one from the chief mechanic at Tokyo, another from the station manager at Shemya.

Q. Do any of those reports purport, if you can tell, to be copies of what was contained in the log?

A. A-38 is a copy of items contained in the log, and A-40. Correction to my statement: A-39 is a captain's report on the flight involved in-bound from Shemya to Anchorage.

Q. What about A-40?

A. A-40 is a copy of the aircraft log items into Shemya, and the corrective maintenance action taken by the Shemya station.

(Testimony of Paul H. Sanders.)

Mr. Koch: I offer these exhibits in evidence as—— [872]

The Court: Which ones?

Mr. Koch: A-37, A-38, A-39 and A-40. Those exhibits as a group purport to continue the history of the maintenance and service done on this plane from January 15 to January 19, 1952. The information was not self-serving in its nature. It was prepared because the CAB authority required a complete history to be maintained on all flights and on all engines, and this was done as the only means of fulfilling the requirement, since the original records were lost.

Mr. Riley: May I inquire?

The Court: You may do so.

Mr. Riley: Each of these exhibits, A-37, 38 and 39, were prepared after the crash of the aircraft, were they not?

The Witness: From records that were made after the crash of the airplane, that were made at the time the——

Mr. Riley: And there were records made before the crash by other personnel who prepared these reports?

The Witness: The record I am speaking of is an activity report maintained by each station, and is maintained for a month or so, and not kept as a permanent record.

Mr. Riley: And these are not the activity reports?

(Testimony of Paul H. Sanders.)

The Witness: These are the maintenance items extracted from those activity reports. [873]

Mr. Riley: They are extracted after the crash of the aircraft, and they are extracted by personnel of Northwest Airlines?

The Witness: That is correct.

The Court: Where are the things from which they were extracted; that is to say, where are the records from which these reports extracted information now reflected in these Exhibits A-37, A-38, A-39 and A-40?

The Witness: Those reports were not retained as permanent records. They are activity reports.

The Court: When were they discontinued as records?

The Witness: They are still carried as records, but they are not retained for any appreciable length of time.

The Court: Where are they?

The Witness: At the stations involved.

The Court: Where are the stations involved?

The Witness: Tokyo, Shemya, Anchorage.

Mr. Riley: I renew my objection.

The Court: The objection is sustained. They should be here subject to cross examination.

Mr. Koch: They are not in existence any more, your Honor.

The Court: This witness has not so stated.

Mr. Koch: He has, your Honor, I beg to differ.

The Court: I did not so understand him, and the Court directs counsel not to dispute the Court. You

(Testimony of Paul H. Sanders.)

might ask, to furnish additional information, but do not dispute the Court. This witness has not said that they are not available. He has said that they were at the stations where—I understood him to mean, where they were made. If you have some more questions to ask this witness, you should devote your attention to that, rather than disputing with the Court. Proceed.

Q. Do you know how long the records from which these offered exhibits were prepared were retained by the stations making them?

A. It was a practice to retain this type of activity report for roughly one month, and then they were destroyed.

The Court: With reference to the loss of this aircraft, that is to say, the occurrence of this accident at Sandspit, when, if they were, were they destroyed?

The Witness: I could not say. This was a record that we were not required to maintain by law. This was a worksheet, more than anything else. Once that particular period was past, the record was removed and no longer used.

The Court: Does anyone else wish to ask any further questions?

Mr. Riley: This is not all of the information that was available, I take it? You state these are extracts? [875]

The Witness: These are the maintenance items from the activity report.

(Testimony of Paul H. Sanders.)

Mr. Riley: The personnel that prepared these still work for the company?

The Witness: I would have to check that. I couldn't state that now.

Mr. Riley: I still think——

The Court: The Court will not admit these exhibits until counsel for defendant shows me some authority directing the Court to do so, for the reason that I think it is not explained satisfactorily to this Court why original records made before this accident happened, which counsel for defendant company now regard as material, were not preserved, in view of the importance of the event about which these summarized records are now offered, which reports are based in part upon those original records which since this accident presumably have been destroyed. It seems to me everything about the nature of this incident involved in this litigation calls for the preservation of every record that was made in the ordinary course of business as an original record which could throw any light upon that, no matter whether the company might think it had made a record since the accident that is interchangeable or not.

Mr. Koch: Your Honor, with respect to the [876] exhibit included in this group which simply states it is the exact copy of the pilot log on the subject, the stipulation entered into that this should be accepted in lieu of the original is, in my judgment, sufficient.

The Court: I will consider that stipulation. I

(Testimony of Paul H. Sanders.)

was considering the oral proof made here on this stand on this occasion, and supplemented in any way material by what was said on Friday of last week regarding the authentication of these documents.

Mr. Koch: On page 2, your Honor, the first three exhibit numbers thereof no longer correspond with——

The Court: Let opposing counsel see it.

Mr. Koch: He has a copy, your Honor. Page 2, the first three designated exhibits are three of the exhibits which are under consideration by the Court now, though they bear different numbers on that stipulation.

The Court: What is the number of the first one? There are about four with check marks.

Mr. Koch: The ones that are checked are the three I had reference to.

The Court: There are 4, beginning with A-18 relative to material contained in a letter dated January 21st from Jaffray at Shemya to Gehringer in St. Paul. Then there is A-19.

Mr. Koch: The one you just read is A-40, your Honor. [877]

The Court: That is A-18, is it, A-40?

Mr. Koch: Yes, your Honor.

The Court: A-19 is a report concerning the Tokyo crew chief's log, contained in a letter January 21, 1952. The date of this accident was the 19th, was it not, of January?

Mr. Koch: That is A-38, your Honor.

(Testimony of Paul H. Sanders.)

The Court: That letter is dated January 21, 1952, two days after the date of this accident, and it is from Mr. Greer, the defendant's chief mechanic at Tokyo. It is addressed to Mr. Gehringer at St. Paul. There is a third one, A-20. Which one is that?

Mr. Koch: What does it contain, your Honor?

The Court: A-20 comprises maintenance reports on ship 342 contained in a letter dated January 19, the very day of this accident, from N. B. Lynn, defendant company's chief mechanic, and Mr. Shelley, defendant company's relief crew chief at Elmendorf Air Base, to the defendant's Gehringer at St. Paul.

Mr. Koch: That is A-37, your Honor.

The Court: Is there another one?

Mr. Koch: Yes, your Honor. I don't have a copy, but the letter from Captain Hohag, dated January 24th. He was the pilot from Shemya to Anchorage, and I believe——

Mr. Riley: Referred to in the stipulation as A-17. [878]

Mr. Koch: It is on the bottom of the first page.

The Court: Does what is on the bottom of the first page concern any exhibit which you wish here to deal with at this time?

Mr. Koch: On the last line of the first page, there is a reference, I believe, to A-17, which is a leteter from Captain Hohag to Mr. Cox.

The Court: Is that the one that I mistakenly said that caused you to assign A-20 to it?

(Testimony of Paul H. Sanders.)

Mr. Koch: No, your Honor. We are correct on our numbers. This is the fourth item, and it is A-39.

The Court: So A-34 is what was formerly A-17, is it?

Mr. Koch: Yes, your Honor.

The Court: That is a letter dated January 24th, which is about five days after this accident.

Mr. Koch: That is correct.

The Court: Is there anything else? There is still a fifth exhibit, A-35.

Mr. Koch: That one is an original and won't be difficult. I haven't offered that one yet.

The Court: This letter which is now marked A-39, as I said, is dated the 24th of January, five days after the occurrence of this accident. It is from Mr. Hohag. He is captain of flight 324, and I don't know whether it means that he served as [879] such captain from Shemya to Anchorage. It may be.

Mr. Koch: That is what it means.

Mr. Riley: If your Honor would refer to the stipulation, the second paragraph on page 1 of the stipulation now in your Honor's hands——

The Court: Line 14, page 1?

Mr. Riley: Yes, your Honor. The words, "That the documents which have been identified by counsel as described hereinafter are true copies of original documents in the possession of the defendant Northwest Airlines, and that the said copies may, if otherwise admissible, be admitted in evidence in lieu of the originals."

(Testimony of Paul H. Sanders.)

Referring to Exhibit A-39, I cannot understand Mr. Koch asserting that that would be otherwise admissible. It is the rankest of hearsay, a statement by a captain not now in court, probably still employed by Northwest Airlines, made five days after the crash.

The Court: The Court holds that a report or a communication commenting upon an original exhibit is not admissible unless—among other things, but certainly unless the original thing on which it makes comment is brought forward in the courtroom and submitted for cross examination. There is no showing in this case sufficient to justify the destruction which has been referred to of the [880] original things about which these exhibits were created. These things are manufactured things. They are not things created in the ordinary course of an everyday business as a normal business practice, but they are something that was done after the event which is here in dispute, namely, the occurrence of this accident; with one exception, I believe, and that is the one which was dated the very same day of the accident, and I don't know when with reference to the occurrence of the accident, but it was so near to it as to raise in the Court's mind an inquiry of great caution lest it be something which was purposely substituted for an original document by somebody—not by this witness, does the Court charge; not by counsel, does the Court charge—but by somebody who may have had the financial interest of this defendant at

(Testimony of Paul H. Sanders.)

heart. So this objection and these objections to each and all of these exhibits which are copies—I am not talking about the original things made in the ordinary course of business—are sustained.

Mr. Koch: Your Honor, I would like to make an offer of proof.

The Court: You may do so.

Mr. Koch: I wonder if I may have the briefest reference to——

The Court: Proceed to make the offer of proof, or else pass the point. [881]

Mr. Koch: I offer to prove that Exhibits A-37, A-38, A-39 and A-40, comprising reports of the mechanical condition of the plane on January 17, 1952, at Tokyo, at Shemya, and at Anchorage, and the report of the pilot who flew the last leg that the plane completed, Captain Hohag, from Shemya to Anchorage on January 18, 1952, would demonstrate clearly that the plane was properly serviced mechanically; it was checked regularly; it was found to be at each of these points in safe and proper operating condition; and that no difficulties which subsequently caused the flight to lose the No. 1 engine existed in any of these points covered by the above referred to exhibits.

The Court: Opposing counsel has an opportunity to state his position on the offer that was made.

Mr. Riley: I think that the letters themselves and the testimony of the witness in regard to the same indicate that they are extracts, and they are made afterwards, and as such constitute self-serving

(Testimony of Paul H. Sanders.)

declarations and are offered in lieu of the original records, which have admittedly been destroyed. I don't think anything else needs to be said. Thank you, your Honor.

Mr. Koch: I would like to call the Court's attention to the rule admitting records made in the ordinary course of business, and refer to the fact [882] that these records were required to be made in the event of an airplane accident by the Civil Aeronautics Administration, and they were made because the original record, which was the pilot log, was destroyed. Since this record was the only official original record of the entries made en route, the copy which the Court says should have been kept for the purpose of litigation was also inadmissible, under the Court's ruling, as I understand it, because the only original record went down with the ship.

The Court: I am not talking about the copy. I am talking about the original. The persons who made the original, as well as the persons who made these copies, so far as anything to the contrary is here shown, may be produced as witnesses and testify to what the facts are, irrespective of these exhibits. The objections are sustained, insofar as they relate to these things which are in the nature of a report reflecting a study of other records. If there is one of these which is not that sort of thing, I want you to call it to my attention.

Mr. Koch: One purports to be an exact copy of the record that is not in evidence, and under the

(Testimony of Paul H. Sanders.)

stipulation, since that record, the Court has indicated, would have been admissible, I should think that one exhibit——

The Court: What is the number of it?

Mr. Koch: Exhibits A-38 and A-40 purport to [883] be exact copies of the records from which they were made.

The Court: Let opposing counsel see them.

Mr. Riley: Unless Mr. Koch is testifying that these are not extracts, I believe the witness has already said that they are merely extracts.

Mr. Koch: I don't understand the witness to have so testified, your Honor.

The Court: A-38 is dated January 21, two days after the accident, and it quotes a report from some office, "The following is the report from the Tokyo crew chief's log," and that log, as I understand from counsel offering this, was destroyed after this event.

Mr. Koch: Yes. Mr. Riley has stipulated that that is a copy of the original of the log.

The Court: I did not so understand. I understood that the matter relating to copies was a matter concerning the thing which is offered being a copy of some original paper. This is an original, itself.

Mr. Koch: I think the sentence reads, if you have the stipulation——

The Court: "* * * that the documents which have been identified by counsel as described here-

(Testimony of Paul H. Sanders.)

inafter are true copies of original documents. * * *"
This is no true copy of any original.

Mr. Koch: It says it is a copy of the pilot's log. [884]

The Court: It does not say that. It does quote something in it. The thing itself, namely, the communication, is not a copy.

Mr. Koch: Your Honor, this is a signed original. I don't know it could have any other meaning. We are not offering a carbon copy. This is an original.

The Court: Because what it is is a report on something else, it is not the act of anybody. It is not anything which Mr. Mechanic said to Mr. Cost Superintendent in the ordinary course of Mr. Mechanic's duty and Mr. Cost Superintendent's duty, that this is the fact of what I am now today doing in the ordinary course of my business. What it is is a report from a subaltern to a superior employee, which in its essence is a copy from another document which this company, as stated by this witness, destroyed after this accident.

Mr. Koch: It was not destroyed when it was made; it was destroyed after this letter was written, before this lawsuit was brought.

The Court: The objection and the objection to the offer are sustained, for the reasons which the Court has already stated. There is no justifiable reason presented explaining why those original records were destroyed by this company after this accident, which was such an important incident in

(Testimony of Paul H. Sanders.)

[885] the life and business of this defendant company. Anybody in the world would be put upon notice that such a record about such an important thing might be needed in the future for any and many legitimate purpose or purposes. You may proceed.

Q. Handing you Plaintiffs' Exhibit 22, are you familiar with the subject matter contained in that exhibit? A. Yes.

Q. On the large card, does it have a name by which I can refer to it?

A. The large card is entitled, "DC-4 type Master Aircraft Log."

Q. On that Master Aircraft Log, does it show the times since overhaul on the No. 1 engine of plane 601?

A. It is a record of all of the engines on 601.

Q. Does it show the total time since overhaul of the No. 1 engine at the time of the accident?

A. Yes, it does.

Q. What number of hours does it show?

A. This record shows 1725 hours and 16 minutes.

Q. On the small cards—I think they are called Engine Accessory Cards, are they not?

A. Engine Accessory Record.

Q. Does it show the time since overhaul of the No. 1 engine at the time of the accident?

A. No, not at the time of the accident. [886]

Q. Does it show the time since overhaul at the time the engine was put on the plane?

A. It indicates that.

(Testimony of Paul H. Sanders.)

Q. What was that date?

A. The 17th of December, 1951.

Q. And on that date, what was the time since overhaul of the No. 1 engine?

A. Total time of the No. 1 engine of 555 hours, 16 minutes.

Q. 555 hours, 16 minutes? A. Yes.

Q. Can you determine from the large card what the total elapsed time on the No. 1 engine was on December 17, 1951?

A. I will have to calculate that.

Q. Will it take you long?

A. The time as of December 17th?

Q. Yes.

A. The time on the large card indicates on December 17, 1951, 1346 hours and 06 minutes.

Q. 1346 hours and 06 minutes compared with 555.16 on the other record? A. Yes.

Q. Are you able to explain this discrepancy?

A. Yes, I think I can.

Q. Will you, please?

A. Subsequent to the accident involving this [887] particular airplane, Northwest Airlines was advised by TWA of a discrepancy in engine time.

Mr. Riley: I object. He is making reference to hearsay. I ask that it be stricken accordingly.

The Court: The objection is sustained. It is stricken, and the Court will disregard it.

Q. Will you, if you are able to, will you explain the discrepancy from your own knowledge?

(Testimony of Paul H. Sanders.)

The Court: Was not the discrepancy the subject of the hearsay?

Mr. Koch: No, the discrepancy of the time shown on one record compared to the time shown on the other record.

The Court: What two records are you referring to?

The Witness: The first record is DC-4 Master Aircraft Log.

The Court: Does it have a number in this case?

Mr. Koch: All in Plaintiffs' Exhibit 22, your Honor.

The Court: Plaintiffs' Exhibit 22 is said to be a company record of the No. 1 engine showing the operation time, that is in hours, or times since the overhaul, etc. Read the question.

(Last question read by reporter.)

The Court: Able without reference to some other record other than what you have just stated.

A. The record on this particular engine was [888] corrected subsequent to——

The Court: Which? Is that record identified by an exhibit number? If so, what?

The Witness: Your Honor, they are both on the same exhibit, Plaintiffs' Exhibit 22.

The Court: You may proceed.

The Witness: The time indicated on December 17th was corrected subsequent to the accident to agree with the actual engine time as it was discovered during the course of investigation.

The Court: Which figure is now in the form

(Testimony of Paul H. Sanders.)

which it was made to have on that occasion subsequent to the accident?

The Witness: The time on the engine as of December 17, 1951, was corrected subsequent to the accident.

The Court: What is the figure that is so corrected?

The Witness: 1346 hours and 06 minutes.

The Court: That figure is something that went on this normal company record already in existence, but it was put on there after the accident, is that right?

The Witness: That is correct.

The Court: To conform with somebody's study or report, is that right?

The Witness: Yes, sir.

Q. Where did you get the information that the Northwest Airlines records as they existed at the [889] time of the accident did not correspond to the records maintained by Trans-World Airways?

A. We received information from Transcontinental & Western Airways——

Mr. Riley: Objection. He is making reference again to this information received from a third party.

The Court: He cannot state the information.

Mr. Koch: He hasn't your Honor. He said that was the source of his information.

The Court: The Court has heard his statement, and he has not done so, and I direct that he do not do so. Mr. Sanders, state if you know what

(Testimony of Paul H. Sanders.)

person in your company's employ directed that change and specifically authorized or instructed in such way as resulted in that one or some other employee writing in such employee's own handwriting the figures "1346" on that exhibit after the occurrence of this accident?

The Witness: I only have an opinion on who it might have been, your Honor. I can't tell you exactly who issued the instructions to change the record.

The Court: Did you do it?

The Witness: No, sir.

The Court: You say you do not personally know who did it?

The Witness: I do not personally know who [890] issued the instructions to change the record.

The Court: What persons have the duty and authority to direct the making of such a change, if you know? What persons in your company at that time?

The Witness: At that time, the manager of the mechanical division would have been the individual who would have issued the instructions to make the change.

The Court: Occupying what position?

The Witness: Manager of the mechanical division.

The Court: You may inquire.

Q. Do you know who had the responsibility for overhauling the engines leased from TWA?

A. TWA.

(Testimony of Paul H. Sanders.)

Q. What information did the company have with respect to the time since overhaul of the No. 1 engine on this aircraft before the accident?

Mr. Riley: That is a leading question, if the Court please. I haven't taken exception to a number of them. I think he should inquire if he knows.

The Court: I ask that you so word that question.

Q. Do you know whether the company had any information with respect to the time since overhaul on the No. 1 engine before the accident?

A. The office responsible for keeping time on engines did not have any information other than that change the record here indicates. [891]

Q. Was there any procedure established, if you know, for relaying the information on overhauled engines between TWA and Northwest Airlines?

A. There was a procedure.

Q. Can you explain it?

A. Under our agreement with Transcontinental & Western Airlines, we were to be supplied zero time engines, or in case of a part-time engine, the record section and the line maintenance office in St. Paul was to be notified of any part-time engine and the time that was on it prior to shipment to Seattle.

Q. Do you know what happened in this case?

A. Yes, I do.

Q. Will you relate that, please?

A. Neither the line maintenance office nor the records section in St. Paul were notified of this. However, the stock clerk in charge at the Seattle

(Testimony of Paul H. Sanders.)

station was notified of the time on this particular engine as part of the shipping papers that followed the engine to Seattle.

Q. How was he notified, if you know?

A. As part of the packing slip. The information was contained on the packing slip.

Mr. Riley: I will have to object to that. It is obviously not the best evidence. If there is such a [892] packing slip, let the defendant produce it.

The Court: The objection is sustained.

Q. Did the mechanical division in Seattle have information with respect to the time since overhaul of this engine? A. No, they did not.

Q. The mechanical division and the routing office in St. Paul, do you know whether or not they had information respecting the time since overhaul of the No. 1 engine?

Mr. Riley: I will have to object to that. He is leading the witness, calling for a hearsay answer.

The Court: Sustained.

Q. What information, if you know, did the mechanical division at St. Paul or the routing office in St. Paul have with respect to the time on the engine at the time it was received from TWA?

Mr. Riley: Same objection.

The Court: That objection is sustained. I instruct counsel to discontinue such questions as this. You may ask this witness what he knows about that, or what some other witness who may be on the stand, when he is on the stand, what he knows about that, if he knows anything about that, but

(Testimony of Paul H. Sanders.)

you cannot ask this witness nor any other such questions as you last stated.

Q. What information did you have with respect to the time since overhaul of the No. 1 engine when [893] it was sent to Northwest Airlines from TWA? A. None.

Q. And where were you located at that time? A. In St. Paul.

Q. What were your duties at that time?

A. At that particular time, I was the assistant manager of the inspection division.

Q. In the normal course, where would such information from TWA with respect to time since overhaul on an engine be received in St. Paul?

A. In the records section, in the maintenance office, and in the routing office.

Q. With respect to time since overhaul on engines received from TWA under this contract, was a part of your duties to receive such information and to be familiar with it? A. Yes.

Q. Do you know what kind of damage is produced by an oil cooler failure?

A. Primarily, the loss of oil.

Q. Do you know whether or not it is physical damage or heat damage of some sort?

A. Fairly common damage to——

The Court: One proper form of question would be to ask him to state, if he knows, what the cause is.

Mr. Koch: I stand corrected, your Honor. [894]

Q. Will you answer the Court's question?

(Testimony of Paul H. Sanders.)

A. The major cause for damage to oil coolers, by experience, has been due to ice, either ice forming within the area in the cooler core, or from ice thrown into the leading edge of the cooler from propeller de-icers. This is a physical damage, where it batters in the leading edge of the core and causes leakage.

Q. Do the records, Exhibits 22 and 23—will you check the exhibits before you, and when you have done so, advise the Court whether or not they cover servicing, maintenance and overhaul of the oil cooler assembly on the No. 1 engine of this aircraft?

A. Plaintiffs' Exhibit 23 is the aircraft logbook for DC-4 601 from 9/9/51 through 1/6/52. It covers the maintenance performed on the airplane through that period. I will have to check a little further to see whether it covers this particular oil cooler. This record covers the engine change that was made on the 17th. That's all I can tell you from the record here.

Q. The 17th of what?

A. The 17th of December, 1951.

Q. Does that record indicate whether or not the oil cooler was changed at that time?

A. This record does not indicate that the oil cooler was changed at that time. [895]

Q. Does the record in Plaintiffs' Exhibit 22 have any reference to oil cooler change?

A. In Plaintiffs' Exhibit 22, the oil cooler is

(Testimony of Paul H. Sanders.)

indicated as being changed on 12/17/51, at the time the engine was changed.

The Court: At this time, we will take a ten minute recess.

(Recess.)

The Court: All are present. You may resume the interrogation.

Q. What was the total time elapsed on the oil cooler, if you know and can tell from the records before you, when it was installed on December 17, 1951?

A. I will have to work this off the time card.

Q. At the time it was installed, not at the time of the accident.

A. The oil cooler was a zero time oil cooler at the time it was installed.

Q. It had no time on it?

A. It was a newly overhauled oil cooler.

Q. Are you able to determine from the records before you how long the oil cooler on the No. 1 engine had been in operation from the time of its installation until the time of the accident?

A. It was in operation from December 17th to the time of the accident, which would have been [896] the difference between 1346 hours and 1725 hours, roughly 400 hours.

Q. What is the significance, if any, of the fact that the No. 1 engine was overtime in itself but the oil cooler on the No. 1 engine had only 400 hours?

A. There is no significance.

(Testimony of Paul H. Sanders.)

Q. What is the time required between overhauls of the oil cooler?

A. The normal overhaul on an oil cooler is 1500 hours. However, oil coolers are changed with each engine change, or were at that time changed with each engine change.

Mr. Koch: Will you hand the witness Plaintiffs' Exhibit 30?

Q. Is there any relation between the fact that the engine was overtime and the oil cooler was not overtime so far as the failure of the oil cooler in this accident is concerned?

A. There is no relationship.

Q. In your opinion, would the overtime engine in any way contribute to the failure of the oil cooler on this flight?

A. In my opinion, no.

Q. How much oil was consumed, if you know, by Engine No. 1 between Shemya and Anchorage on the return flight from Tokyo?

A. The record indicates a total of 10 gallons of oil.

Q. What was the average oil consumption of the No. 1 engine from Seattle to Tokyo and return as far as Anchorage? [897]

A. The over-all average was about .68 gallons per hour.

Q. What kind of engine was on the aircraft No. 1 position?

A. A Pratt-Whitney R-2000.

Q. Do you know whether or not the manufacturer's limits covers normal oil consumption?

A. Yes, they do.

(Testimony of Paul H. Sanders.)

Q. Do you know what it is?

A. At the time the Pratt-Whitney maximum oil consumption per hour limit on this particular engine was two gallons per hour. However, we were using a figure much lower than that, a figure of one gallon and a half per hour as the maximum normal oil consumption.

Q. Did the pilot record in his logbook engine oil consumption?

A. Only after it exceeded one and a half gallons per hour.

Q. Does it do so on this flight at any time?

A. No, it did not. The segment of the flight in which the ten gallons of oil was used was a segment involving seven hours and seven minutes of flying time. The oil consumption would then figure out to about 1.4 gallons per hour for the No. 1 engine.

Q. What is the distance from Shemya to Anchorage? A. Roughly 1600 miles.

Q. Do you know whether or not the type of service check performed at Anchorage on this plane included a check for oil leaks? [898]

A. Yes, it did.

Q. Referring to Plaintiffs' Exhibits 22, 23 and 27, have you reviewed the maintenance and inspection records with respect to the No. 1 engine on 601?

A. Yes, I have, but I do not have those exhibits.

The Court: For the moment, I do not locate Plaintiffs' Exhibit 27. I cannot locate any action

(Testimony of Paul H. Sanders.)

taken by the Court on it. Who was testifying when the exhibit was admitted, if anyone?

Mr. Koch: I believe Mr. Matthews.

The Court: That is correct, and it was admitted in connection with his testimony. You may proceed.

Mr. Koch: Would you read the last question, please?

(Last question read by reporter.)

A. Yes.

The Court: Are those records so reviewed now in evidence as any exhibit, in whole or in part?

The Witness: Plaintiffs' Exhibits 23 and 27 are maintenance records.

The Court: Are the only ones you considered those named by counsel, those exhibit numbers?

Mr. Koch: 22, 23 and 27, your Honor.

The Witness: 22, 23 and 27, I have here.

The Court: Are those the only sources of information used by you in making answer to this last question? [899]

The Witness: There are other records available here in the court which are part of this record.

Q. What other records are there?

A. The No. 2 check records, etc., that are here.

Mr. Koch: I will withdraw this question and ask questions relating to the exhibit containing the records Mr. Sanders has reference to first, if it please the Court.

The Court: That will be agreeable.

Q. What is Exhibit A-35?

A. A-35 is the record for the No. 2 maintenance

(Testimony of Paul H. Sanders.)

check performed in Seattle on January 13 through 15, 1952, on DC-4 601.

The Court: If I were in your place, I would keep my voice raised clear and distinct, Mr. Sanders.

The Witness: Yes, sir.

Q. Is Exhibit A-35 original records prepared by the company at the time that inspection was made?

A. Yes, they are.

Q. What does that exhibit consist of? I notice there are several parts to it.

A. The exhibit consists of a ground check sheet; inspection progress report; non-routine inspection writeups; and routine work cards.

Q. When was that inspection performed?

A. During the period January 13 through January 15, 1952, at Seattle. [900]

Q. What is the method of making inspections adopted by Northwest Airlines on its aircraft?

A. The method is pretty well universal. It is prescribed by law, under the CAA. Each airline has specified maintenance periods at which routine maintenance and inspection is accomplished on each airplane. At the time of this accident, Northwest Airlines had approved a 100 hour inspection period, inspection and check period. This means that each 100 hours, a routine maintenance service was performed on each of its aircraft. In this case, each of these 100 hour services would have been performed at the Seattle station.

Q. At the end of each 100 hours, was the service

(Testimony of Paul H. Sanders.)

performed the same as at the end of the preceding 100 hours?

A. No, it was successively increased, so that at the end of a No. 4 check, in other words, at the end of 400 hours, a maintenance cycle was complete, each one progressively covering more of the airplane as it progressed toward the 400 hour interval.

Q. At what part of the cycle was the No. 2 check performed?

A. The 200 hour interval.

Mr. Koch: I will offer A-35 in evidence, your Honor.

Mr. Riley: We have no objection to that.

The Court: Admitted. [901]

(Defendant's Exhibit A-35 for identification received in evidence.)

The Court: What do you call it, Mr. Koch?

Mr. Koch: No. 2 inspection.

The Court: Does that denote the second of a series of inspections?

Mr. Koch: Yes, your Honor. This is the end of 200 hours.

Q. Taking into consideration Plaintiffs' Exhibits 22, 23 and 27 and Exhibit A-35, does that cover all of the information relative to maintenance of the subject aircraft, and particularly the No. 1 engine, available to the company?

A. It covers all the information for the period concerned.

Q. Considering these exhibits, what if anything

(Testimony of Paul H. Sanders.)

were you able to observe with respect to the No. 1 engine from its history since it was given a top overhaul by TWA in January of 1951?

A. The engine record indicates the engine was No. R-2000 engine, with the normal amount of maintenance and corrective action applied to it that you would expect in any other engine of its particular type.

Q. Did the history show anything of significance with relation to oil consumption? A. No. [902]

Q. I am referring to the No. 1 engine. Mr. Sanders, are you familiar with the type of life vests that were on the plane? A. Yes.

Q. What type were they?

A. Standard C.O.2 operated vest-type life jackets.

Q. Do you know whether or not the life vests on the plane at the time of the accident were the same as the life vests that were described in the ditching folder that has been introduced in evidence? A. Generally, yes.

Q. How do you know that?

A. I had occasion to observe some of the life vests that were on this particular plane. As part of my job, I by necessity have to keep familiar with this type of thing.

Q. Are those life vests made in accordance with any particular specifications?

A. Yes, I believe they are made to an AN spec, an Army-Navy specification.

Q. Do you know whether or not all of the life

(Testimony of Paul H. Sanders.)

vests that the company had in use at that time were made to such specifications? A. Yes.

Q. With reference to life rafts, Mr. Sanders, were they recovered after the accident?

A. Yes, both life rafts were recovered. [903]

Q. Where were they found?

A. They were both picked up from the beach. However, the day that I arrived in Sandspit, which would have been on Sunday afternoon——

Q. Do you know that date?

A. I think January 20th is the date. We made several low passes in the aircraft that I arrived in all over this area. At that time, we observed one life raft floating on the water some distance from the shore.

Q. When these life rafts were found, were they inflated or not?

A. They were not inflated. They were still in their containers.

Q. Were they subsequently tested with respect to their inflatability?

A. One of them was, and it checked out completely serviceable.

Q. At the time you arrived and saw this one raft floating, what was the condition of the airplane at that time?

A. It was still pretty well intact at the time.

Q. Do you recall the fuselage?

A. It was pretty well intact, too.

Q. Do you recall whether or not any of the other

(Testimony of Paul H. Sanders.)

contents of the plane had been washed ashore at that time?

A. No, not that early. Four or five days later, after heavy seas, some of the components of the airplane started coming up on the beach, but not as early as this time. [904]

Q. Were other contents of the fuselage recovered at about the same time as you noticed this life raft floating, or do you recall?

A. To the best of my knowledge, about the only thing that was floating at that time was personal clothing, overcoats, military overcoats, and that type of thing.

Q. Do you know whether or not other contents of the fuselage were located or found floating subsequently?

A. Subsequent to the time, quite a few things were found subsequently.

Q. Such things as what?

A. After four or five days, most of the interior of the cabin was—at least, parts of the interior of the cabin were found at various stages, either floating or on the beach, seat cushions, hat racks, galley equipment, and things of that nature, but this was sometime in the latter part of the following week.

Q. From these observations, is it your opinion that the life raft may have been launched by the crew or by passengers?

A. That is hard to say. Somehow or other, they

(Testimony of Paul H. Sanders.)

got out from under the straps they were tied down with and got afloat.

Q. What type of flares did the airplane carry?

A. This airplane, as all airplanes operating in transport service, carried two three-minute, parachute-type magnesium flares. [905]

Q. Could the parachute flares have been used at the time of the accident?

A. It is hardly probable, because parachute flares of this particular type, manually operated type of flare, has to fall about three hundred feet before the magnesium is ignited.

Q. Is it your opinion that this plane did not gain that altitude?

A. With the time element involved, it wouldn't seem to me there would have been time to drop a flare.

Q. Would the discharge of Very pistols have provided a little illumination, in your opinion?

A. Very pistols are not designed for illumination. They are designed for signaling.

Q. What have you to say with respect to the possible risk attendant to the use of Very pistols?

A. In the case of an airplane hitting water, with a lot of gasoline on the wings, it would be risky business to attempt to use a Very pistol in that area.

Q. What is that exhibit, 15?

A. It is a Northwest Airlines aircraft maintenance and inspection service bulletin, dated August 29, 1951, Bulletin No. 144.

(Testimony of Paul H. Sanders.)

Q. Does that bulletin show differences in configuration between the TWA plane and the Northwest Airlines plane, standard planes? [906]

A. The purpose of this bulletin at the time was to point out the differences in those airplanes acquired from other airlines to operate in the North Pacific airlift into Korea.

Q. Was that exhibit part of the Northwest Airlines maintenance manual at the time of the accident, if you know?

A. As a service bulletin, it became part of the maintenance manual.

Q. Assuming that this Northwest Airline plane was flying from Anchorage to McChord Field at an altitude of 10,000 feet at night on an overwater flight, and was proceeding with the No. 1 engine feathered to Sandspit, would you say the passengers should be apprised of the situation?

Mr. Riley: I will object to any testimony by this witness as to how aircraft should fly or performance of aircraft in flight, as not being shown he is a pilot or qualified as a pilot.

The Court: I understand he is offered as the litigant.

Mr. Koch: Your Honor, this exact hypothetical question was asked of Mr. Opsahl is at the Seattle-Tacoma Airport in the capacity of an inspector. He has the same general type of job as Mr. Sanders, except his is much more inferior. If that was a proper question of Mr. Opsahl, an answer to it

(Testimony of Paul H. Sanders.)

by Mr. Sanders would seem to fall within the objection that Mr. Riley makes.

The Court: You are not in this question [907] offering the answer of this witness as the answer of the litigant in this case?

Mr. Koch: I do, your Honor.

The Court: If this defendant were a natural person, that natural person as such litigant would be permitted to entertain and answer certain questions which an ordinary witness would not do unless the witness had certain qualifications. The qualifications rule as to a witness being permitted to state his opinion does not usually apply to the litigant. My understanding is that this witness is offered as the litigant in this case because, among other reasons, no other corporate official of the defendant will be offered as a witness to speak as the litigant, am I correct in that?

Mr. Koch: You are correct, your Honor.

The Court: The objection is overruled.

Q. Would you like to have the question reread?

A. Yes.

(Last question read by reporter.)

A. Not ordinarily, particularly at night where most of them would be asleep.

Q. Under those same hypothetical facts, Mr. Sanders, should the crew have readied the life rafts in advance? A. No.

Q. With respect to launching life rafts, Mr. Sanders, do you [908] know whether or not there

(Testimony of Paul H. Sanders.)

was any Northwest Airlines procedure or regulation relative to launching life rafts?

A. Yes, there was a procedure.

Q. Was that procedure followed here?

A. No, because this wasn't a planned ditching. This was a takeoff accident.

Q. In case of a planned ditching, do passengers launch life rafts?

A. No, that is the crew's responsibility. However, the crew may request assistance from an individual.

Q. A particular passenger?

A. A particular passenger, perhaps.

Mr. Koch: May I confer for just a moment, your Honor?

The Court: You may do that.

Q. Plaintiffs' Exhibit 27—do you know whether or not any mechanical difficulty with respect to the No. 1 engine of any importance resulted on the return flight from Tokyo to Shemya to Elmendorf?

A. To the best of my knowledge, the difficulties encountered through the flight with any of the engines were of a minor nature and had no bearing on the subsequent failure of the No. 1 oil cooler.

Q. Do you know whether or not any conditions reported with respect to the performance of the aircraft en route were corrected at the points en route, Shemya and Elmendorf, [909] before the flight took off from Elmendorf?

(Testimony of Paul H. Sanders.)

A. Those items which required correction were corrected.

Q. Do you know that from your own knowledge? A. From the record.

Q. Is that correct? A. That is correct.

Mr. Koch: No further questions.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Riley): This aircraft was delayed at Shemya for over four hours for a mechanical difficulty, wasn't it?

A. For a magneto change.

Q. Isn't a magneto change very serious? It is the most basic and most difficult difficulty you can have in an engine, isn't it?

A. Not in my opinion, no. A magneto change is a fairly common occurrence on anybody's airline, anybody's airplane.

Q. Magneto difficulty is not a minor difficulty at all. Do you classify magneto trouble as something that can be glossed over?

A. Something that can be corrected fairly easy, does not necessarily affect an engine. After all, dual ignition was provided. [910]

Q. You mentioned the crew in this case in the ditching off Sandspit following company procedures, and because this was an unplanned ditching, I take it from your testimony, on this type of ditching it is every man for himself?

A. I did not make that statement.

(Testimony of Paul H. Sanders.)

Q. Did you say the crews followed company procedures?

A. I said the procedures established by the company were procedures planned for planned ditchings.

Q. They have no procedures for unplanned ditchings? A. That is not true.

Q. Is there any difference between unplanned ditching and planned ditching as far as getting out of the aircraft is concerned?

A. There is a considerable difference between a takeoff accident and a planned ditching. This was a takeoff accident.

Q. You testified that the aircraft when you flew over it was in substantially good condition. You rendered a lengthy report after your return from Sandspit, and it was signed by you, do you recall that report?

A. A report was submitted to the CAB as part of our activities during the course of the investigation.

Q. Do you recall the statement set forth there, captioned Monday, January 21, 1952: "Although the sea was running fairly heavy, an observation crew consisting of Northwest [911] Airlines personnel Matthews, Sanders, Cox, Leonard, a boatman and one member of the Royal Canadian Mounted Police rowed around the aircraft for a period of time in an attempt to observe the amount of damage to the aircraft. The aircraft by this time had broken into two separate pieces. The

(Testimony of Paul H. Sanders.)

break occurred at a station immediately forward of the main entrance door. The aft section had moved approximately 100 yards east of the forward section. Not much else could be determined, and the party returned to shore.

“During this time, another party while searching the beach at low tide found the complete nosewheel assembly had broken loose from the aircraft and had been washed up to where it was recoverable at low tide.”

Do you recall that report?

A. That indicated the condition of the airplane on Monday.

Q. Did you observe the aircraft and row around it on that date? A. January 21st, yes.

Q. Is there any reason why in this report it was not reported at any time in the report that a life raft was observed floating?

A. This was a report on salvage activities at Sandspit, and was intended as such to show the effort expended to salvage this particular airplane.

Q. It states under the caption Tuesday, January 22, 1952: [912] “Many pieces of debris were found on the beach, including lavatory bulkheads and doors, cabin seats and sections of floor planking.”

Isn't a life raft of sufficient importance to have been mentioned in this report?

A. Probably so; however, it wasn't because this—again, I have to say this report was written with the intent to show the degree of salvage. We were

(Testimony of Paul H. Sanders.)

making every effort to recover the airplane in order to ascertain the reason for the accident.

Q. Referring to Plaintiffs' Exhibits 14 and 15, is there any mention in there or any reference made to life rafts, life jackets, survival equipment aboard this aircraft which were intended to be covered by Plaintiffs' Exhibit 15?

A. There is mention of the fact that there are some differences in cabin configuration.

Q. Referring to Plaintiffs' Exhibit 14, does that document make reference to Ship 601 or DC-4 45342? A. Yes, it does.

Q. Does it indicate the cabin configuration of that ship?

A. It indicates the basic seating arrangement, yes.

Q. Does it indicate the location of the life raft on that ship? A. No, it does not.

Q. What is the wingspan of a DC-4?

A. 119 feet, 6 inches or thereabouts. [913]

Q. Mr. Cox testified that with the snow piled on the sides of the runway, that the runway was approximately 120 feet wide. Would you say his estimate was approximately correct?

A. I would say that would be approximately right, yes.

Q. About six inches clearance between wing tips on the aircraft and the sides of the runway on landing at Sandspit?

A. Assuming the snowbanks were the same height.

(Testimony of Paul H. Sanders.)

Q. About how high was the snow piled on the edges of the runway?

A. I would guess four feet, maximum.

Q. There were no electric lights at the time of the crash on the field?

A. The electric lights were covered by snow.

Q. What type of lights, flare pots, did they have, do you know?

A. In use?

Q. In use. A. The oil-burning type flare pot.

Q. Do you know whether or not the company's investigation indicated that the rudder tab on ship 601 had been frozen as it cruised between Anchorage and Sandspit?

A. There was some indication of a pilot report that in the early part of the flight, the pilot felt the rudder tab may have been frozen. I think later on there was no further mention made of it. It was in the early part of——

Q. Do you know what the adiabatic lapse rate is? [914]

A. Vaguely.

Q. Would you say approximately what it is?

A. The standard temperature change with altitude.

Q. Does it increase or decrease?

A. It decreases with altitude, roughly five degrees per thousand feet.

Q. If the temperature at the field were 32 to 34 degrees, can you on the basis of your present information about adiabatic lapse rate estimate the temperature at 10,000 feet?

A. No, I couldn't, because it is a fairly common

(Testimony of Paul H. Sanders.)

phenomenon, with the temperature inversion, it could be 40 degrees at 10,000 feet and 30 degrees on the ground.

Q. Are you stating that is a fairly common phenomenon at 10,000 feet?

A. Temperature inversion at altitude is a fairly common phenomenon.

Q. Are you stating it would be a common thing for it to be 40 degrees at 10,000 feet if it were 34 degrees on the ground?

A. Not common, but not unheard of.

Q. It would be extremely unusual, as a matter of fact, wouldn't it? A. It has happened.

Q. If the pilot had reported a frozen rudder tab, it would be most unusual, wouldn't it?

A. As I stated before, it was my recollection the rudder tab [915] was reported in the early portion of the flight.

Q. If it had been reported as frozen in flight while cruising at 10,000 feet and the temperature on the ground was 32 degrees, wouldn't you consider it extremely unusual for that rudder tab to thaw out during the rest of the flight?

The Court: Mr. Riley, your rapidity of statement indicates more argument than not. Will you please try to form your question in a concise way and do not keep running on and on and on so fast that neither the reporter can record nor the Court can hear and understand your statement. I do not know whether the witness can hear you or not, but your questions take on an obviously argumentative

(Testimony of Paul H. Sanders.)

tone which neither the witness nor anyone else can really understand.

Mr. Riley: Thank you, your Honor. I will try to do so.

Q. Mr. Sanders, if a rudder tab had been frozen in the course of the flight at 10,000 feet and the ground temperature at the point of destination was 34 degrees, would you state whether or not you would assume that the rudder tab would still be frozen at the time of landing or not?

A. There is a good possibility that it still may have been frozen at the time of landing. [916]

Q. Tell us what the effect—assuming that the rudder tab froze prior to the loss of the No. 1 engine, would you tell us what the effect of the loss of the rudder tab would be as far as controllability of the aircraft is concerned?

Mr. Koch: I object to the question. There is no evidence in the record at any time that I can recall of the rudder tab being frozen, and now for the witness to assume that the rudder tab was frozen, after he has completed his case, and to ask for the witness to make additional assumptions based upon that hypothesis which is not in evidence, is carrying the point beyond all reasonable bounds.

The Court: What have you to respond?

Mr. Riley: I objected to his calling Mr. Sanders in the first place. As I recall, the Court reserved the right to go beyond the scope of cross examination and re-open. In the first instance, Mr. Sanders

(Testimony of Paul H. Sanders.)

has already testified it was reported the rudder tab was frozen.

The Court: Mr. Sanders, do you recall having so testified or made a statement on that point as to the freezing of the rudder?

The Witness: I think I stated in the testimony somewhere in the course of this accident investigation some statement was made that in the early portion of the flight, [917] the rudder tab was frozen.

The Court: The objection on that point is overruled.

Mr. Koch: That is just in cross examination he has made this statement. It didn't come up on direct.

The Court: The objection is overruled. Do you understand the question? Read the question.

(Last question read by reporter.)

A. It is my opinion——

Mr. Koch: I will ask one other question.

The Court: The objection is overruled.

Mr. Koch: I understand that, but I think that the question should ask if he knows, since he is not a pilot.

The Court: The objection is overruled. Counsel has a right to ask this question. This is cross examination.

A. It is my opinion, with the rudder control available on a DC-4, that an average pilot would be able to keep the airplane under directional con-

(Testimony of Paul H. Sanders.)

trol, insofar as the rudder is concerned, with a frozen rudder tab.

Q. Would it increase or decrease the hazard of landing on a 120 foot wide runway which was coated with snow of approximately six inches and was slippery?

Mr. Koch: I object to that. There is no evidence about the six inches of snow.

The Court: The objection is overruled.

A. May I have the question again, please? [918]
(Last question read by reporter.)

A. It would probably increase.

Mr. Riley: Does the clerk have Plaintiffs' Exhibit 32? It was rejected at the time of offer. I don't know whether it was returned or not, or whether counsel would have it.

The Clerk: It was withdrawn.

Mr. Riley: Does counsel have that portion of the manual dealing with three-engine ferry operations? It was marked Plaintiffs' Exhibit 32. I will pass to another question.

May the witness see Defendant's Exhibit A-31?

The Court: Received to illustrate the witness' testimony, Mr. Sanders.

Q. While we are looking for that, do you recall the approximate amount of delay from the time Flight 324 landed at Anchorage until it departed?

A. No, I don't recall the delay. However, it is my impression that there was a delay caused by the military authorities with some customs clear-

(Testimony of Paul H. Sanders.)

ance, some type of thing, for some considerable period.

Q. Before each flight, the crews of this aircraft do inspect the aircraft from the outside, is that right, before they board the aircraft?

A. The flight crew? [919]

Q. Yes. A. Generally, yes.

Q. Can you describe what you mean by this inspection? Is this a visual inspection of the exterior of the aircraft?

A. As far as the flight crew is concerned, it would be a walk-around type of thing.

Q. They don't remove any of the cowling from the nacelles in those inspections?

A. They certainly don't.

Q. Is this given any particular title, this type of inspection, a pre-flight inspection?

A. No, it isn't. The basic responsibility for releasing the airplane to the flight crew is held by maintenance. They are the people that make the complete inspection.

Q. Does a basic pre-flight inspection require the removal of the cowling of the aircraft engines prior to releasing the aircraft for flight?

A. No.

Q. At the time the aircraft was inspected at Anchorage prior to its departure for the United States, the inspection again consisted of an inspection of the exterior of the aircraft and the engine nacelles and the propeller assembly, is that correct? A. I think that is generally true.

(Testimony of Paul H. Sanders.)

Q. As I understood your testimony last week, you stated that [920] the oil cooler indicated—oil falling from that portion would indicate that oil was coming from the oil cooler, is that correct?

A. That is correct.

Q. Where is the oil sump located in the engine nacelle?

A. The rear end of the engine, in the lower half of the accessory case.

Q. Are there lines running from the oil sump to the oil cooler? A. No.

The Court: How much more time do you need to finish with this exhibit?

Mr. Riley: Just briefly.

The Court: I am not asking you to shorten the time.

Q. Is the oil cooler and the oil sump and the engine itself connected directly or——

A. They are not connected.

Q. How does the oil flow between the oil cooler to the engine?

A. Through the engine oil pump.

Q. Does it go through the oil sump and then to the engine?

A. From the cooler through the sump into the engine?

Q. Yes. A. No.

Q. Would you describe as briefly as you can the course of travel of oil in a complete cycle from the engine through the sump through the cooler?

A. Oil is returned from the engine to the tank

(Testimony of Paul H. Sanders.)

through the cooler, back into the engine through the pump.

Q. There are lines and hose flex lines connecting the sump, the engine and the cooler?

A. Obviously, there are lines between the cooler and the engine and the cooler and the tank.

Q. So that oil falling from the oil cooler section visible externally could be falling from the oil cooler, the oil sump above it, or anything in the engine nacelle above the oil cooler, isn't that correct?

A. No, I wouldn't say that. Oil leakage from the rear end of the engine or accessory in the engine would not follow that pattern. The oil cooler is completely baffled, for fire protection, primarily, top and bottom completely shrouded. It has fireproof flexible lines running through this baffling to the engine and to the tank. It is completely enclosed.

Mr. Riley: That is all I have with reference to this exhibit, if the Court please.

The Court: Court will be at recess until 1:30.

(Recess.)

The Court: All are present. You may resume the interrogation.

Mr. Riley: May the witness see Plaintiffs' Exhibit 29?

Q. Did you revisit the scene of the crash of the aircraft at [922] Sandspit, British Columbia, later in the year of 1952?

A. No, I did not.

Q. Was the scene revisited?

(Testimony of Paul H. Sanders.)

A. It was revisited by a representative of the Airline Pilots Association and a representative of the Flight Operations Department of the airline.

Q. Is that Mr. Helm? A. Yes.

Q. Is Mr. Helm here now?

A. Mr. Helm is dead since the accident.

The Court: After this accident occurred, what was the first date you visited the scene of it?

The Witness: I arrived on the scene of the accident January 20th.

The Court: After learning that an accident had taken place?

The Witness: That is correct.

The Court: To your knowledge, had any other company official from St. Paul reached the scene or undertaken any investigation?

The Witness: Not from St. Paul. Mr. Helm, however, who was chief pilot for the western region in Seattle, arrived there a day prior to my arrival.

The Court: And he of course undertook, did he, under your direction or someone else's direction, to take [923] steps which it seemed that the circumstances called for on behalf of the company?

The Witness: That is correct, sir.

Q. Did you observe the wreckage of the aircraft at low tide? A. Not at extremely low tide, no.

Q. As I understood your report that you submitted to the company, you made your way in a boat to the wreckage of the aircraft at low tide on the Monday following the crash. Wasn't that substantially your testimony?

(Testimony of Paul H. Sanders.)

A. Not at low tide, because at low tide it wasn't possible to do much operation in this area with a boat, because there was very little water in the area. There were some puddles and ponds. The low tide at the time of year the accident occurred was about 1 o'clock in the morning. We did attempt, however, one night after dark to walk to the wreckage and were almost successful except we had to call a halt to it because we got fogged in, and because of the fog decided to return to the beach.

Q. You could not reach the wreckage at that time? What was the reason for the revisit to the scene by Mr. Helm and others later in the year? Was it because the tide had been reported extremely low, or was there some other reason?

A. Many times during the year there were low tides. This happened to be the most opportune time, I suppose. I can't tell you why this particular date was picked. There [924] were some questions that were outstanding as part of the investigation, and the reason for the revisit was to, in effect, finalize those questions.

Q. Was the wreckage of the aircraft out of water during high tide?

A. At the extreme high tide, no.

Q. What portions of the aircraft were out of water at low tide?

A. During the eight or ten days that I was at Sandspit, at low tide, when it was possible to ob-

(Testimony of Paul H. Sanders.)

serve this at low tide, when it was in the daylight hours, the top of the fuselage.

Q. Do the pictures you have before you there represent the amount of exposure of the wreckage of the aircraft at low tide, approximately?

A. At the time these photographs were taken, there is very little left of the aircraft. Almost the entire fuselage is gone, so it is hard for me to say how much of it would be out of water at low tide so far as the complete airplane is concerned. There is very little left on these photographs except the center wing of a DC-4. Most of the rest has been carried away.

Q. Referring to the top photograph of the group designated as Plaintiffs' Exhibit 29, can you tell in which direction the picture is taken? In other words, what land is shown [925] in that picture? Would that be the nearest land to the aircraft?

A. It is awful hard to establish direction here. This is the Island of Moresby, but in what direction or what part of it, I can't tell you. There are no identifying landmarks here to make a guess on that.

Mr. Riley: May the witness have Exhibit 37?

Q. You have stated earlier that the history on engine 701355 showed a normal history and that there was no showing of abnormal or excessive oil consumption, is that correct?

A. I made the statement that oil consumption reported on the engine was not above the maximum

(Testimony of Paul H. Sanders.)

normal allowable oil consumption of one and a half gallons per hour.

Q. As a matter of fact, isn't it true that the engine No. 701355 was removed from ship 608 in May of 1951 for the precise reason that it was burning too much oil?

A. We are talking about the engine as it was installed on 601. That is correct, the engine was removed on 608, returned to TWA for overhaul because of oil consumption.

Q. The entire engine wasn't overhauled, was it?

A. It was given a—we established the fact after the accident that the engine was given a so-called top overhaul, in which all of the cylinders, pistons, piston rings, etc., those things which are normally associated with oil [926] consumption, were changed.

Q. What is the relationship of TWA in this operation? They are an independent contractor, rendered services to you pursuant to a contract. Is that a correct statement?

Mr. Koch: I object to that question until we establish the witness' knowledge of the law of independent contractors, etc.

The Court: I believe that objection should be sustained.

Q. Under what arrangement, so far as you know, was TWA hired, if that is the case, to repair this particular engine?

Mr. Koch: I object to that, too. There is no evidence that that was the fact.

(Testimony of Paul H. Sanders.)

The Court: The objection is overruled.

A. I can only tell you my impression of this thing. The contract arrangements, etc., I do not have a working knowledge of. I can tell you my impression of it.

Mr. Koch: I don't think the——

The Court: There is no question asked him. It is up to counsel to ask him another question.

Q. After 701355 was removed from ship 608, what if any action was taken with respect to the aircraft engine itself, No. 701355?

A. The engine was returned to TWA at Kansas City.

Q. What if anything was done to it at Kansas City?

A. It was given, as I stated before, which we found out [927] subsequent to the accident, it was given a top overhaul.

Q. Is it a fact that Northwest Airlines at Seattle was advised that the engine was given a top overhaul when the engine was returned to Northwest Airlines at Seattle?

The Court: On what date, if you know, or approximately what date?

Q. Do you know the approximate date when this aircraft engine was returned to Seattle?

A. I don't know at this time, no.

Mr. Riley: I would like to show the witness Plaintiffs' Exhibit 37.

The Court: You may do so.

Q. I show you what has been marked for iden-

(Testimony of Paul H. Sanders.)

tification as Plaintiffs' Exhibit 37. I note that your name appears on page 2 of that document. Do you recall having received this communication, dated February 6, 1952?

A. A carbon copy was addressed to me, apparently, at that date.

Mr. Koch: I am sorry to interrupt, but I haven't been shown the exhibit. I would like to know what it is.

The Court: If it is in evidence——

Mr. Riley: No, your Honor. This was earlier rejected, if the Court please.

The Court: Let him see the exhibit.

Q. While he is examining that exhibit, you have testified that the engine time records on engine No. 1 on the company [928] records in St. Paul were corrected after the date of the accident, is that correct? A. That is correct.

Q. And you have testified that in December the total time for this oil cooler was shown to have been 555 hours or in that neighborhood, is that correct?

A. No, I didn't make that statement. I said the engine records in December, at the time it was installed on this airplane, showed 555 hours, 16 minutes.

Q. The records to which you referred which related the time on the oil cooler assembly, do you recall what they reflected as the total time for this particular oil cooler component in January, 1951?

A. They did not reflect the time for this particular oil cooler. They reflected the time on the

(Testimony of Paul H. Sanders.)

engine at the time it was installed in the No. 1 position on this particular airplane.

Q. Is there any written record that you have in your possession or Northwest Airlines has in its possession which shows the flight time on the oil cooler components of engine No. 701355 on January 19, 1952?

A. Well, as I stated in earlier testimony, the oil cooler was changed at the time the engine was changed. Somewhere in the inspection records there is a detail card, and it has been here on the table. [929]

Q. Are you referring to the TWA detail card?

A. I am not referring to the TWA detail card. I am referring to the inspection record made in Seattle indicating the inspection of the oil cooler change at the time of the engine change on December 17, 1951.

Q. Whether it was or was not, this very oil cooler would have been removed again at the time the engine would have been removed if the engine had been removed at 1500 hours, isn't that correct?

A. Any time the engine is changed, or any time an engine was changed on a DC-4 at this particular time, the oil cooler was changed, whether it was a scheduled engine change or an off schedule engine change.

Mr. Riley: Referring to what has been marked for identification Plaintiffs' Exhibit 37, I will read the fourth paragraph, which states——

(Testimony of Paul H. Sanders.)

Mr. Koch: Just a minute.

The Court: Has it been admitted?

Mr. Riley: Pardon me, your Honor. It has not.

The Court: You cannot do that over objection.

Q. Do you recall receiving Plaintiffs' Exhibit 37?

A. As I say, the letter indicates I received a carbon copy of it, and I assume that I did.

Q. To whom is the communication directed?

A. Directed to Mr. D. S. Cox, Manager, Flight Operations. [930]

The Court: Is plaintiff trying to prove the admissibility of this document now?

Mr. Riley: Well, actually I don't care to admit the entire document. I would want to examine as to portions of it.

The Court: If you have not done so, and I question whether you have, in view of your response, consider the consequences of your cross examination on this exhibit. You may proceed.

Mr. Riley: Pardon me a moment, your Honor.

The Court: You may.

Mr. Riley: I will strike that, and ask that the witness see Plaintiffs' Exhibit 30. Does the witness have Plaintiffs' Exhibit 27?

Q. After engine 701355, the history of which is contained in Plaintiffs' Exhibit 27, was removed from ship 608 because of excessive oil consumption, can you by referring to Exhibit 27 tell what was done with engine 701355?

A. Without looking at the record, I know from

(Testimony of Paul H. Sanders.)

my own knowledge that the engine was returned to Kansas City.

Q. After it was returned from Kansas City to Seattle, do you know what was done with it?

A. It was installed in No. 4 position on ship No. 608 on 10/23 and removed on 12/5/51.

Q. After its removal, it was then installed in ship 601, [931] which was the aircraft which crashed at Sandspit on January 19, 1952?

A. It was held as a spare from 12/5 to 12/17, and then installed on ship 601 in No. 1 position.

Q. Does Plaintiffs' Exhibit 27 disclose that the engine was originally removed from 608 and sent to TWA at Kansas City because of excessive oil consumption?

Mr. Koch: That has been covered by previous testimony, your Honor.

The Court: Have you not gone into that point in this cross examination?

Mr. Riley: I will withdraw it. I didn't know I was repeating.

The Court: I am not certain that you have. I am asking you.

Mr. Riley: My co-counsel says I have covered that. I will withdraw that question.

Q. I will ask you to refer to Plaintiffs' Exhibit 30.

The Court: The record of No. 1 engine oil consumption. That is what the nature of the information is.

Q. Can you state by referring to Plaintiffs' Ex-

(Testimony of Paul H. Sanders.)

hibit 30 what the average hourly oil consumption was on the flight of Flight 324 between Shemya and Elmendorf on the 17 - 18 of January?

A. Yes. [932]

Q. Would you state what it is?

A. 1.41 gallons per hour.

Q. Does the exhibit indicate the amount of oil consumed by the No. 1 engine on that aircraft on the flight between Shemya and Anchorage on the 17 - 18 of January? A. Yes, it does.

Q. And what amount of oil did it consume?

A. Ten gallons in seven hours and seven minutes.

The Court: Ten gallons in seven hours and seven minutes.

The Witness: Ten gallons in seven hours and seven minutes.

The Court: That gallonage per hour for that amount of total is what?

The Witness: 1.41 gallons per hour.

Mr. Riley: I have no further questions, if the Court please.

Redirect Examination

Q. (By Mr. Koch): Was it the practice, Mr. Sanders, if you know, when an engine was changed and a different oil cooler installed on the plane, to install any available oil cooler that didn't have more than 1500 hours time on it?

A. No, that was not the practice. [933]

Q. What was the practice?

(Testimony of Paul H. Sanders.)

A. A zero time since overhaul oil cooler was always installed.

Q. If an engine was removed because it had close to the maximum of 1500 hours time on the engine and an oil cooler might only have two or three hundred hours, do you know whether or not the company would have that oil cooler overhauled anyway?

A. The oil cooler would be returned to overhaul.

Q. On the subject of the width of the runway at Sandspit, did you testify to the width?

A. I believe I did, yes.

Q. Do you recall your testimony?

A. Somewhere in the vicinity of 120 to 130 feet.

Q. Is that the original width or the width after reduction by flare pots?

A. That was the plowed width of the runway.

Q. The plowed width was how much?

A. My guess was between 120 to 130 feet.

Q. What was the height of the snowbanks on the sides of the runway?

A. There were some areas in the vicinity of the turn off taxi strip that maybe were as high as four feet. Other than that, I'd say they averaged two and a half to three feet.

Q. What is the height of the wings on the plane?

A. At the wingtip, you mean? I would offhand hazard a guess [934] from 12 to 14 feet.

Q. What is the height of the wing at the side of the plane?

(Testimony of Paul H. Sanders.)

A. Top surface, probably six and a half or seven feet off the ground.

Mr. Koch: I have no further questions.

The Court: Is there anything further?

Mr. Riley: No, your Honor.

Mr. Koch: Just a moment. There is a matter I wanted to bring to the Court's attention. On the direct examination of Mr. Sanders on Friday, I asked some questions and intended to go into the matter of what happened on the runway or when the plane took off on the runway, from that point to the point that the plane dipped in the water, that caused the plane to go into the water. I was asking about how the nose gear was retracted, and I was leading from that into matters that would have been offered to explain what actually resulted when the plane left the runway until the time the accident happened.

Mr. Riley interposed objections to the questions, and the Court sustained further inquiry along the line of the nose gear and possible retraction difficulties which I would have gone into. If the Court ruled considering that it wasn't in the plaintiffs' case and therefore it was just delaying the trial, and the Court isn't interested in that explanation, I have no objection to that, but if [935] the Court feels that—if it is incumbent upon the defendant to explain what happened that prevented the plane from accelerating in a normal fashion, then this evidence, it seems to me, should be admitted.

(Testimony of Paul H. Sanders.)

The Court: Have you offered any evidence that calls for this rebuttal?

Mr. Riley: I don't believe that I did, your Honor.

The Court: Do you seek in argument to draw any inferences from facts regarding that last point?

Mr. Riley: No, your Honor. My objections at that time were principally, among other things, because Mr. Sanders is not a pilot, in addition to the other, but I don't recall bringing anything out on cross examination that would require us to go into that area.

The Court: Do you intend to argue from the facts either as a circumstance indicated by the facts or as to somebody's direct testimony on the issue that he mentioned in his last statement?

Mr. Riley: I am not sure I understand.

The Court: Read Mr. Koch's statement.

(Last statement of Mr. Koch read by reporter.)

The Court: Do you tender by any allegation of proof that issue mentioned by him in his statement last made?

Mr. Riley: I am afraid that we would, your Honor. I think we would be entitled to rely as to this—— [936]

The Court: You may further inquire. I do not know whether the Court will rule in your favor upon any objection that may be made as to a particular question. It seems to me the condition that he found the nose gear in, if he got there quick

(Testimony of Paul H. Sanders.)
enough after the accident that it is the condition after the accident, would be admissible. I would think that would be admissible. I understand you have already examined him on that condition, have you not, the condition he saw?

Mr. Koch: Your Honor, I can't answer you directly. The nose gear was recovered and it was tested, and with respect to its mechanical performance, there is evidence that bears on the issue that I have raised.

The Court: In view of counsel's last statement, I will not rule that you may not ask him what he knows about the condition of the nose gear. I have the impression that you already asked him questions about the nose gear.

Mr. Koch: I asked him some of them, your Honor, but I had not completed the development of the theory of the accident.

The Court: The Court, notwithstanding the previous ruling, will permit you to ask him anything you haven't already about what he found to be the condition of the nose gear. By that I do not wish to validate him at this time as an expert witness on nose gear or as to his [937] qualifications to give opinion evidence on nose gear.

Mr. Koch: I will ask him questions in an attempt to so qualify him, your Honor.

The Court: I want you to go ahead, whatever it is. Proceed.

Q. (By Mr. Koch): Will you relate briefly your experience in dealing with nose gear problems

(Testimony of Paul H. Sanders.)

that the airline industry has faced in the last number of years?

A. Well, subsequent to this particular——

The Court: Answer that yes or no.

A. Yes.

Q. And did that experience relate to DC-4 type aircraft? A. Yes.

Q. What is the nature of your own efforts in that area?

A. Well, subsequent to the accident involved, we as well as other airlines in the country had some——

The Court: Are you asking him for his experience, or what is it his employer did?

Mr. Koch: I am asking for his own personal experience.

The Court: Don't say anything about "we". He asked you what you personally have done in that regard.

A. As a result of nose gear incidents on DC-4's subsequent to this particular accident, I participated in considerable [938] investigation on DC-4 nose gear steering and nose wheel retraction operations.

The Court: That was after this accident, did you say?

The Witness: That was after this accident.

Q. Did that experience cause further investigation of this accident to be made?

A. As a result of that, the CAB re-opened the accident investigation on this particular accident.

(Testimony of Paul H. Sanders.)

Q. Did you make further investigations at the time of the re-opening with relation to the nose gear problems and steering mechanism on this aircraft? A. Yes.

Q. Was the nose gear mechanism recovered?

A. Yes, it was.

Q. Do you know whether or not it was substantially intact? A. Yes, it was intact.

The Court: On what date, if you know, was it taken off the airplane?

The Witness: It was recovered on the beach, I'd guess about January 22nd.

The Court: It was not then taken off the beach attached to the airplane, is that right?

The Witness: That is correct.

The Court: Do you know when it came off the airplane?

The Witness: I have no idea. Sometime between the [939] time the accident occurred and January 22nd.

The Court: So I understand you to say the nose gear was reclaimed on the beach on January 22nd, is that right?

The Witness: On about January 22nd.

The Court: Is that on or about the third day after the accident?

The Witness: Third or fourth day. My memory is not positive as to which.

Q. Did you participate in the examination made of the nose gear and nose gear assembly on this aircraft? A. Yes.

(Testimony of Paul H. Sanders.)

Q. When was that investigation made?

A. As I previously stated, my memory is not positive as to the date, but I am of the opinion that it was January 22nd.

Q. What were your findings as a result of that examination?

A. The nose gear and nose gear steering mechanism had been broken out of the airplane in one completely intact unit. As far as examination from the surface was concerned, it appeared to be in good order. The nose gear up lock mechanism was also part of the assembly recovered, and it had evidence of having received a fairly hard blow in a vertical direction. This evidence was in the form of very heavy peening on the lower side of the nose gear up lock hook, and also evidence of the hook digging into the attach fitting on the nose gear olio, and both of these [940] indicated the nose wheel had been forced upward with a fairly heavy impact.

Q. What is the significance of your finding that the up lock—that the nose gear was up and locked, was that your expression?

A. Well, I did not intend to convey the impression that the nose gear was up and locked. I am trying to indicate that the nose gear was forced into the up lock with quite a heavy blow, much heavier than a normal retraction would give you. In other words, there was definitely signs of distress, both in the up lock hook and the attach fitting, the lock attach fitting on the front side of the olio.

Q. Is there any significance in that finding with

(Testimony of Paul H. Sanders.)

respect to whether or not the nose gear mechanism had been retracted?

A. Well, obviously the nose gear had to be somewhere in the general vicinity of up and locked to engage the hook when this heavy vertical blow occurred.

Q. Would that require some action on the part of the pilot?

A. Again, obviously the pilot would have to have retracted the gear for the gear to get in that general area.

Q. Did your examination reveal any evidence of mechanical failure of the nose gear?

A. No, there was no evidence of mechanical failure on the examination conducted at Sandspit and subsequent examination conducted on this gear after it was removed from Sandspit [941] as part of the re-opening of the accident investigation.

Q. Did you inspect the centering cams?

A. Yes, I did.

Q. What is the function of the centering cams?

A. The centering cams are a series of slotted cams designed primarily to center the nose gear prior to it being retracted into the nose wheel well. The nose wheel well was fairly narrow, and if the gear is not centered it will not go completely into the wheel well. It could conceivably lodge on the outside.

The Court: I have not understood you clearly. Did you intend to say finally that the condition of the nose gear and the nose gear steering mechanism

(Testimony of Paul H. Sanders.)

having been driven in some manner upward into or near their normal position while in flight and retracted, that you drew from that an inference that the pilot had accomplished such retraction, or had attempted to, before the crash?

The Witness: Yes, sir.

Q. How long does it take the nose gear to fully retract, if you know, approximately?

A. I'd say an average of about six seconds.

Q. From the end of the runway to the point of impact in the water would take approximately how much time?

A. Approximately 25 or 30 seconds.

Q. Does this lead to the possibility, in your opinion, that [942] the nose gear did not fully retract?

A. The markings as we observed them on the nose gear seem to bear that out.

Q. What could produce such a result? How does that come about, or could it come about?

A. During the course of this re-opened Civil Aeronautics Board investigation, we came up with facts surrounding other incidents that seemed to pretty well parallel these. They were coupled with takeoffs made from runways with snow or slush on them, takeoffs made with a slight crosswind, in both conditions necessitating the use of nose wheel steering right up to the takeoff time; and in cold weather the nose gear is a little slower to completely extend than it is in average temperatures. As a result, some of these instances when a nose gear retracted, it did not center. It stuck off the

(Testimony of Paul H. Sanders.)

centered position, and as a result, jammed prior to the time that it went completely in the nose wheel well and the doors closed after it.

The Court: We have the conclusion of this matter by this witness made the second time, the second time being no different from the first, that he found indications which pointed to his belief that the pilot had retracted this nose gear before the crash. Now, he has come to that conclusion twice. He did it last week; he has done it again. What more do you wish? [943]

Mr. Koch: My understanding of his answer was that he believed that the nose wheel jammed. Now, I am going to explain the significance of that.

The Court: I understood you had finished inquiry of this witness.

Mr. Koch: This same matter, relating to the cause of the accident.

The Court: I thought you had already finished with this afternoon's inquiry a moment ago. After the Court asked a question, you start asking this line of inquiry. I had the impression you had finished, and it has led to nowhere other than where you were last week.

Mr. Koch: I thought the last question did, and I am sure the next two will. I am almost finished.

The Court: Please proceed and finish with the examination.

Q. If the nose gear jams, what effect does that have on the operation of the plane, if you know?

A. Well, if the nose gear jams in a set of cir-

(Testimony of Paul H. Sanders.)

cumstances such as I have just related, the nose gear doors are stuck in the open position and the nose gear wheel well was open, both of these conditions offer considerable more drag to the airplane.

Q. Would that have an effect, in your opinion, on the acceleration and gaining altitude of the aircraft? [944]

A. It would have a direct bearing on the airplane's ability to accelerate and gain sufficient airspeed and altitude.

Q. In your opinion, could it cause the plane to sink into the water? A. It could have.

Q. Is there any evidence that the failure to gain altitude after clearing the obstruction at the end of the runway was due to any other cause?

A. There is no other evidence.

Mr. Koch: I have no further questions.

Q. (By Mr. Riley): Isn't the loss of an engine other evidence as to why the aircraft didn't remain airborne?

A. I assume the last question directed to me refers to the configuration that it was making a landing and go-around at Sandspit.

Q. Wouldn't too steep an angle of attack on three engines at low airspeed also impair the ability of the aircraft to maintain altitude and its airspeed?

A. I am not aware of that being evident.

Q. Wouldn't a bank to the left after takeoff

(Testimony of Paul H. Sanders.)

impair the ability of the aircraft to fly and reduce the effective lift from that which it would have in level flight?

A. Again, I am not giving a pilot's opinion. I would say no, [945] a steep bank probably, but obviously this close to the ground it isn't a steep bank.

Q. How far away from the aircraft was this nose wheel recovered?

A. It was picked up on the beach directly opposite the airplane, I'd say half a mile from the airplane.

Q. It floated in with the tide?

A. Either floated in with the tide or was rolled in on the bottom, one or the other.

Q. There was water between the aircraft at low tide and the shore, I presume?

A. At the time we recovered the nose gear?

Q. Yes. A. Yes.

Mr. Riley: I have no further questions.

Mr. Koch: No further questions.

The Court: You may step down.

(The witness was excused.)

FREDERICK D. CAMPBELL

called as a witness by the defendant, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Koch): Will you state your full name and spell the last name, please? [946]

A. Frederick D. Campbell, C-a-m-p-b-e-l-l.

(Testimony of Frederick D. Campbell.)

Q. Are you a pilot? A. Yes.

Q. Where do you live? A. Bellevue.

Q. By whom are you employed?

A. Pan American Airways.

Q. Will you trace briefly your aviation experience?

A. I began flying aircraft in 1935 and went through the Army flying school in 1939 and 1940. I have been with Pan American Airways ever since, a total of 17 years with Pan American.

Q. What route are you flying now?

A. Seattle to Honolulu.

Q. Did you ever fly a northerly route from Seattle? A. Yes.

Q. What was that route?

A. Generally, Seattle to Fairbanks and Nome.

Q. Does that route that you normally fly bring you in the general vicinity of Sandspit?

A. At the time that I flew it that route did come very close to Sandspit, within about 50 or 60 nautical miles, I believe.

Q. Do you recall a flight that you made on January 18, 1952? A. I do.

Q. Where were you? Between what points were you flying? [947]

A. I was southbound from Fairbanks to Seattle.

The Court: What date was that?

The Witness: January 19th.

The Court: From Fairbanks to Seattle, did you say?

The Witness: Yes, sir.

(Testimony of Frederick D. Campbell.)

Q. At that time, did Pan American use the Civil Aeronautics Administration radio facilities?

A. Yes, they did.

Q. What frequency did you receive and transmit over?

A. I can't recall the—I believe it was 31. I can't say right now.

Q. Do you recall whether or not it was the same frequency as Northwest used at the time?

A. Yes, it was.

Q. Did you hear messages to and from Northwest Flight 324 of the 17th that was proceeding from Anchorage southbound on that occasion?

A. Yes, I did.

Q. Did you learn from your radio facility that Northwest Airlines Flight 324 of the 17th had feathered an engine in flight?

Mr. Riley: I object. Counsel is leading this witness.

The Court: Sustained.

Q. Was there anything during that flight that called your attention to the Northwest flight? [948]

A. Generally the flights from Fairbanks to Seattle——

The Court: Read the question.

(Last question read by reporter.)

The Court: Meaning Flight 324. Answer yes or no.

A. Yes, sir.

Q. What was that, do you recall?

A. I was about to say that the normal——

(Testimony of Frederick D. Campbell.)

The Court: We are not talking about “normally”. We are talking about what happened on this occasion.

The Witness: It was an attempt, sir, to explain how I would have the occasion to hear any messages from Northwest.

The Court: We do not care to have that explanation now. Just say what occurred.

The Witness: Yes, sir. I heard virtually all transmissions Northwest made at that time subsequent to the report on his part of having feathered an engine.

Q. Do you recall the general location of the Northwest flight when it sent that message?

A. I believe it was in the vicinity of an intersection southwest of Sitka. I am not familiar at this time with the name of that intersection, but I can point it out. It was on a chart.

Q. Do you recall what the weather was at Annette Island at the time you became aware of the feathering of the engine on the Northwest Flight 324? [949]

A. The weather as reported by the Air Traffic Control was below minimums. I couldn't say exactly.

Q. What minimums?

A. Below CAA minimums.

Q. Was there a message to that effect from the Annette radio operator to Flight 324?

Mr. Riley: Counsel is still leading the witness.

The Court: Sustained.

(Testimony of Frederick D. Campbell.)

Q. Do you have any recollection of such information being relayed by the Annette operator?

A. Immediately following the report by Northwest that they had feathered an engine, they were given weather reports and/or forecasts for the various fields that they might land.

Mr. Riley: I object. I don't believe he can answer what it was. It isn't responsive to the question, and he is referring to hearsay testimony.

The Court: It is sustained. The Court will disregard his last answer.

Mr. Koch: Would you read the question, please?

(Last question read by reporter.)

The Court: Answer yes or no.

A. Yes, sir.

Q. To whom was that information relayed, if you recall? A. To the Northwest aircraft.

Mr. Riley: He is calling for hearsay, I think.

The Court: The objection is overruled. He can say what the answer was to this question.

Q. Do you recall the question?

The Court: He has answered it. Read the answer.

(Last answer read by reporter.)

Q. Do you recall whether or not you yourself flew over Sandspit that night? A. Yes, sir.

Q. Why did you do so?

A. The ATC requested that I proceed to change frequencies to the range of its frequency at Sandspit, because they wanted to——

The Court: No. The reason why the Court said

(Testimony of Frederick D. Campbell.)

“No” is because you are bringing a lot of hearsay and statements that that question does not ask for, and even counsel asking the question may not care anything about those. Just answer directly. What was the result of somebody’s making some requirement of you, if it was? Tell what it was, and do not go into all this detail.

A. I was requested to go to the other frequency. I did.

Q. Why were you requested to do so, if you know?

A. Because they were unable to ascertain what had happened to the aircraft, I presume, and as such they wanted me to come over and search the area.

Q. Did you do that? [951]

A. Yes, I did.

The Court: What area?

The Witness: The area immediately adjacent or around Sandspit.

The Court: What were you searching for, things in the air or things on the ground?

The Witness: On the ground, presumably, although that wasn’t asked directly of me.

Q. In connection with your search over the area, did you fly across the airport?

A. Yes, I did.

Q. At what height?

A. I believe the first time over the airport was at roughly 200 feet.

(Testimony of Frederick D. Campbell.)

Q. What were you able to observe on the runway, if anything?

A. I saw tire tracks of aircraft, marks on the runway in the snow, appeared to be about three inches deep.

Q. About how deep?

A. Initially, the tracks were about three inches.

The Court: Do not say "initially", but tell him how deep it was, if you saw how deep it was.

A. I saw they were three inches, but they varied in depth.

Q. Where did you first observe these tracks on the runway?

A. About one-third of the way down the runway.

Q. Did you see any threshold lights on the runway? [952] A. No.

Q. Did you see any lead-in lights on the runway? A. No.

The Court: What do you understand by threshold lights, as compared to some other kind?

The Witness: Threshold lights are green lights at either end of the runway indicating the limits of the runway.

The Court: Does it indicate to you anything about permission to land or not to land on that runway?

The Witness: No, sir.

Q. What kind of lighting, if you recall, was on the runway? A. Flare pots.

Q. Where were they located?

(Testimony of Frederick D. Campbell.)

A. On either side of the runway.

Q. Do you recall anything about snowbanks or furrows?

A. I saw some snowbanks on each side, I couldn't say how high.

Q. Where in relation to the snowbanks were the flare pot lights?

A. They appeared to be inside of the snow furrows.

Q. Were they on the surface of the runway or——

A. They were on top of the snowbanks. I can't recall—I'd say that they appeared to be on top of the snow, but inside of the snowbanks, but I'm not sure of that.

Q. With respect to the aircraft marks which you observed on the field, could you tell whether it was a three-engine [953] or four-engine plane, what type of plane the marks came from?

A. I could tell it was a tricycle landing gear, with a nose wheel and two main gear, but I could never tell the number of engines from that.

Q. Will you describe as best as you can the snow tracks that you observed on the runway?

A. At the point one-third of the way down the runway, they appeared to be about three inches deep, the ruts made by the main gear and, for a time, the nose gear. As those marks continued to the end of the runway, or virtually to the end of the runway, they became, the depth became less until finally they disappeared completely.

(Testimony of Frederick D. Campbell.)

Q. Where did they disappear?

A. Practically at the end of the runway, very near it, as I could tell from my pass over the airport.

The Court: You mean so far as you could tell, is that what you mean?

The Witness: Yes, sir.

Q. From that observation, can you judge how far after the point of touchdown the tracks began to appear shallower?

A. It seemed almost immediately afterwards.

Q. Have you ever landed in snow?

A. Yes.

Q. Have you ever landed in a crosswind? [954]

A. Yes.

Q. In your opinion, if you had been the pilot of Flight 324 of the 17th, January 19, 1952, and had landed at Sandspit, British Columbia, slightly high and slightly fast, with the No. 1 engine feathered, at a ground temperature of 34 degrees, in a south-west crosswind, touching down one-third of the way down the runway 5,150 feet long and 150 feet wide, covered with three inches of snow, and with three foot high snowbanks on each side of the runway, which was lighted by flare pots on the surface of the snow inside the runways and which reduced the runway width inside the flare pots to approximately 135 feet, the runway having neither lead-in lights nor threshold lights, would you have tried to stop or attempt to take off again?

(Testimony of Frederick D. Campbell.)

A. I can't answer that, in view of the multitude of variables that did exist.

Q. Do you mean you don't know whether you would do one or the other?

A. I would have to be there and try it before I could answer that.

Q. What would be the considerations that would be in favor of attempting to stop?

A. Well, the remaining length of the runway, and there is a possibility that in the approach they might have had excessive speed or un-normal speed in the approach. That [955] would make part of the decision. Whether or not, if I had had power off in the approach for some period of time, so that I might possibly, immediately applying power to the remaining three engines, they may not take hold immediately and give me full power; or if I had had power on during the landing, where I felt a rapid increase of throttle would actually give me full power immediately. Also, the crosswind that existed.

Q. What effect might that have?

A. Well, we are assuming we have landed and whether or not we would take off, is that the point?

Q. Yes, whether you should try to stop.

A. The crosswind would—No. 1 engine out; the crosswind was from the right; there would be a drift. The tendency of the aircraft would be to weathercock to the right, and you wouldn't have the No. 1 engine to assist you in keeping it straight, so as to stop straight.

(Testimony of Frederick D. Campbell.)

The Court : If you had landed on an area and you could choose whether you would have a three inch snow on the runway or a strong crosswind hitting the plane as it landed; if you didn't have to have both of those conditions, which one would you choose to make it easier on the landing?

The Witness: The landing on three inches of snow without a crosswind would be easiest.

The Court: Easier than landing with a [956] crosswind without the snow, is that right?

The Witness: You said a strong crosswind. Yes, sir.

Q. How long a time would you have had to make up your mind which of these alternatives you would adopt? A. A very few seconds.

Q. In your opinion, is it a close question as to what you would do under the circumstances?

A. As I previously testified, I would say that all things the way they could have been, all one way or all the other, would make a very big difference.

Mr. Koch: I have no further questions.

Cross Examination

Q. (By Mr. Riley): In your approach you made to the field at 4 in the morning, was it still dark?

A. Yes, it was.

Q. And you went over the runway at 200 feet, I believe you testified. How fast were you going?

A. About 135 or 140 miles an hour.

(Testimony of Frederick D. Campbell.)

Q. Could you tell how high the snowbanks were on the edge of the runway? A. No.

Q. Then how in the world can you tell how deep the ruts were on the runway, going 135 miles down the runway at 200 feet? [957]

A. The snowbanks on either side varied, or shall we say rolled, from the rolling motion of the snow, rather than a sharp vertical line like the tires make, and it was my impression that they looked to be about three inches deep. If it had been much more than that, the axles might have made an additional mark on the snow, whereas in the banks on either side, because they varied with the ground level on either side of the runway——

Q. Was your——

Mr. Koch: May he finish his answer?

The Witness: I have nothing further.

Q. Was yours the aircraft that flew over to Annette to pick up Coast Guard personnel and supplies to bring them to Sandspit? A. No.

Q. Do you know whether or not that was done by other Pan American aircraft?

A. It wasn't done by Pan American aircraft.

Q. Do you know whether or not it was done at all? A. No, I don't.

Q. Do you know whether or not other aircraft assisted in the rescue?

The Court: Mr. Riley, you are inclined to do something which I do not know the cause of. Whatever it is, it is not helpful to you and it is not help-

(Testimony of Frederick D. Campbell.)

ful to the [958] witness and the Court. Try to speak distinctly and let the witness understand the question and let others understand it. There is something about your method of speech, or the rapidity of it, or all of the speech characteristics taken together as you employ them, that seems to interfere with the objective in mind. Proceed.

Mr. Riley: I will withdraw the question. Thank you, Your Honor. I have no further questions.

The Court: Is there anything else?

Mr. Koch: No, Your Honor.

The Court: Step down. Call the next witness.

(The witness was excused.)

DONALD L. LEONARD

called as a witness by the defendant, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Karr): Will you state your full name for the record, please?

A. Donald L. Leonard.

Q. Where do you live?

A. At 16244 8th Avenue South, Seattle, Washington.

Q. What is your occupation?

A. Captain of Northwest Airlines. [959]

Q. How long have been connected with the aviation industry? A. Since 1941.

Q. What educational background did you have for your aviation work?

(Testimony of Donald L. Leonard.)

A. High school and college.

Q. What line of study did you pursue in college?

A. Aeronautical engineering.

Q. When you entered the aviation industry in 1941, in what capacity did you commence your work?

A. I started as a student in 1941 to learn to fly.

Q. You said you have been with Northwest Airlines since 1944?

A. I hadn't said that, but it is right.

Q. How long have you been a captain of Northwest Airlines?

A. About six years.

Q. Did you have some military experience in the field of aviation during the war?

A. I taught flying for two and a half to three years in the military.

Q. Approximately when was that?

A. In 1941, 1942 and 1943 early 1944.

Q. Since you became associated with Northwest Airlines in 1944, have you been regularly engaged in flying ever since?

A. Yes, sir.

Q. What types of aircraft have you flown?

A. For Northwest Airlines, I have flown [960] the DC-7, DC-6, Boeing 377, 1049, DC-4, DC-3, and I have flown many of the military—most of the military heavy bombers, some of the fighters, all their trainers, plus some jet aircraft such as the 707 and the T-33.

Q. Have you had experience in flying the route between Anchorage, Alaska, and Seattle, Washington?

A. Yes, sir.

(Testimony of Donald L. Leonard.)

Q. The route which the plane was flying at the time of the accident that is the subject of this case?

A. Yes, sir.

Q. One of those routes is overwater, the overwater route. There is another route over the land, I believe. Have you flown both of them?

A. Yes, I have.

Q. Have you ever been into the Sandspit airport in an airplane? A. Yes, sir.

Q. What is the Airline Pilots Association?

A. It is a professional organization comprised of airline pilots throughout the world.

Q. Do you occupy an official position in that organization?

A. Yes. I am the Regional Safety Engineering Chairman for this region.

Q. How long have you occupied that position?

A. About seven years.

Q. What are your responsibilities in connection with aircraft [961] as Regional Safety Engineering Chairman for ALPA?

A. I cooperate and coordinate procedures, airways, and all relevant safety matters with the Government agencies, including accident investigations and preparation for hearings, etc.

Q. As Regional Director, what does the region consist of which you direct?

A. The western states of Montana, Idaho, Oregon and Washington, with some assistance in Alaska and Hawaii.

(Testimony of Donald L. Leonard.)

Q. Are there other pilots who work with you as their director in this Regional Safety work?

A. Yes, sir.

Q. You referred to the aircraft accident investigations. Is that a part of your job as Regional Safety Director?

A. Yes, sir.

Q. Have you investigated aircraft accidents on more than one occasion during the last six or seven years you have occupied your present position?

A. Yes, sir.

Q. Could you give us a general idea of the extent or the number of aircraft accidents you have had occasion to study and investigate?

A. I never counted them. It's around 20 or 25, I would guess.

Q. Is your work limited to aircraft accidents of Northwest Airlines, or does it include accidents that occur to any [962] airline in your region?

A. It includes all airlines in my region.

Q. In connection with your investigation work, do you serve as a member of the investigating team?

A. Yes, sir.

Q. Are you called in investigating work solely by the Airline Pilots Association whom you serve as Regional Director, or are you sometimes called in by others?

A. I am sometimes called in by the Civil Aeronautics Board to assist them.

Q. You have participated in investigations at their instance, have you?

(Testimony of Donald L. Leonard.)

A. Yes, specifically for non scheduled air carriers where they have no technical representative in the pilot field. They will ask our help in the accident investigation.

Q. Have you also done consultation work on air safety and engineering matters?

Mr. Riley: Mr. Karr falls in the same practice of leading the witness as Mr. Koch does.

The Court: Avoid leading. It is not necessary. This man is too intelligent to lead.

Q. What if any consultation work have you done in air safety and engineering matters?

A. I have done some work with aircraft manufacturers and component manufacturers such as Boeing Aircraft, Douglas [963] Aircraft, Lockheed, Hamilton Standard.

Q. Did you have a part in the investigation of the Sandspit accident which is the subject of this lawsuit?

A. Yes.

Q. Did you go to the scene of the accident?

A. Yes, I did.

Q. And about when did you arrive there?

A. About eight hours after the accident.

Q. That would be on the morning of January 19th, is that correct?

A. Approximately 9 A.M. in the morning.

Mr. Riley: I would like to ask if this witness went there at the request of the Civil Aeronautics Board, and if he did, I object to any testimony he might have, counsel having been able to keep out anything I tried to bring in from the CAB.

(Testimony of Donald L. Leonard.)

The Court: This man is a sworn witness and he can testify to what he saw on the ground. He may not be permitted over objection to testify to certain deductions or the results of studies, but he can testify as to what he saw, unless the time it was seen is too remote.

Mr. Riley: That is exactly what counsel has been able to keep me from showing. I have had documents and reports which it was felt were self-serving declarations of the company which were submitted to the CAB.

The Court: That is an act of something with the hand [964] or mind. What he says he saw with his own eyes is subject to your cross examination, and the Court is of the opinion that nothing has occurred to indicate the justification of any ruling upon his qualifications to testify or propriety of his doing so as to a given question. You may proceed. Ask him appropriate questions.

Q. I think you said you arrived on the morning of the 19th. About how many days were you at Sandspit on that occasion?

A. Approximately two weeks.

Q. Was your time during that entire two weeks devoted to investigation of this case?

A. Yes.

Q. Could you tell us in general what your activity was in that connection?

A. Well, of course, our first assignment arriving at the scene——

(Testimony of Donald L. Leonard.)

The Court: Not "our", your.

A. My first assignment on arriving at the scene as part of the investigating team was to first of all assure ourselves that the survivors were adequately taken care of and that we had recovered all the survivors, so we devoted a few hours to that endeavor.

Q. Did you interview survivors in the course of your work? A. Yes, sir.

Q. What else, in general, did you do? Whom did you interview, [965] just so we have a general picture of your activities?

A. We interviewed the radio operators on duty at Sandspit, the airport management, the people at the Department of Transport, Canadian Pacific Airline guest house that had the survivors in bed and had helped take care of them. We talked to the Department of Transport people that were part of our investigating team, just in general went on with our investigative work.

Q. Did your work either at Sandspit or subsequent thereto also include interviewing Northwest Airlines personnel who had some connection with the accident?

A. Yes. As part of our accident investigation, we had to go over the maintenance records, the crew training records, and the flight plan and the flight log and the radio reports, weather reports, etc.

Q. Did you check all those at one time or another as part of your work?

(Testimony of Donald L. Leonard.)

A. Yes, sir, I did.

Q. Did you also while you were at Sandspit on this occasion of ten days or two weeks after the accident have opportunity to examine the plane itself?

A. Yes.

Q. Did you do that on more than one occasion?

A. Yes.

Q. Were you actually aboard the plane in the course of that [966] investigation?

A. Yes, the first morning I arrived at the scene, the aircraft was partially out of the water. We could walk——

The Court: Ask him a question.

Q. On how many occasions were you aboard the plane during your investigation there in that two week period, just in general? A. Three times.

Q. Were efforts made to salvage the plane while you were there? A. Yes.

Q. Did you participate in that activity?

A. Yes.

Q. In connection with the CAB hearings in the case, did you appear as a witness at the hearing in Seattle? A. Yes, I did.

The Court: CAB hearing?

The Witness: Yes, sir.

Q. Did you return to Sandspit in June, 1952, for further investigation and check?

A. Yes, sir.

Q. About when did you do that?

(Testimony of Donald L. Leonard.)

A. We arrived there on June 8th.

Q. How long did you remain on that trip?

A. Three days.

Q. Was there subsequent consideration and investigation of [967] this accident by the CAB after your later study at Sandspit?

A. Yes, there was.

Q. Did that involve study by you or investigation by you of the nose gear assembly?

Mr. Riley: Counsel is leading the witness, if the Court please.

The Court: The objection is sustained.

Q. What if any study of the nose gear assembly did you make after your initial work?

Mr. Riley: I will object. Strike that.

The Court: You may proceed.

A. I had the nose gear air expressed to me from Sandspit here at Seattle, and we inspected it here in Seattle, then forwarded it to the Civil Aeronautics Board in Washington for further investigation.

Q. And after further investigation by the CAB, was there an additional hearing in St. Paul sometime in 1955?

A. Yes, sir.

Q. Did you also participate in that hearing?

A. I did.

Q. Let me direct your attention to the subject of briefing of military personnel who are to engage in an overseas flight. Are you familiar, in general, with the provisions of the contract between Northwest Airlines and the United States Govern-

(Testimony of Donald L. Leonard.)

ment on the matter of briefing personnel in [968] advance of flight? A. I am.

Q. Had you prior to this accident flown out of Haneda Airport, from which this flight originated, on more than one occasion? A. I had.

Q. Had you on any occasion observed the briefing procedures which the Government followed in advising military personnel in advance of such a flight, in conformity with the contract provision?

A. Yes, I had.

Q. Would you describe it to us?

A. I had not seen the entire briefing procedure, but we had to walk through the briefing room at both McChord Field and Haneda Airport in Tokyo on our way to the dispatch office, so the briefing was in progress. They would get the passengers in a room with a display of all of the emergency equipment. The life raft would be fully inflated with all its emergency provisions spread out around it such as emergency food, fishing kit, bailing basket, oars, canopies, etc., Gibson Girls, emergency radio, life vests, and the military would give a general briefing of this equipment, plus its usage, to the passengers.

Q. Was that procedure followed as a preliminary to each overseas flight of military personnel?

A. To the best of my knowledge, it was conducted before each [969] departure, yes, sir.

Q. Was similar procedure conducted by the military in Seattle for flights en route from this side over to——

(Testimony of Donald L. Leonard.)

Mr. Riley: Counsel is consistently leading this witness.

The Court: Sustained.

Q. Was there any difference in the procedure that you have described, Captain Leonard, in flights originating from Seattle to Japan?

A. The flights originated at McChord Field at Tacoma, and the procedures were precisely the same.

Mr. Riley: I think that is all irrelevant, unless counsel wants to offer some proof that he can contract away their obligation to brief these passengers themselves. The Civil Air Regulations are in evidence, and it is required by them in so many words to brief their own passengers. I think it is a well-established proposition in law that no person can contract to relieve himself of the duty imposed upon him by law, 38 Am. Jur., Negligence, and many cases cited thereunder. I am not admitting for a moment that these passengers were ever briefed, but it seems to me we are going far afield.

The Court: The Court is not getting that impression. What do you propose to prove that is material to this evidence, if it was done by the military? [970]

Mr. Karr: I propose to prove, your Honor, that the facilities for briefing were infinitely more elaborate and complete than they could have been to passengers on an airplane. I don't contend at all, as Mr. Riley suggests, that we tried to relieve ourselves of anything, but I am trying to explain the

(Testimony of Donald L. Leonard.)

type of instruction that the passengers we had were given before they got on our flight, and every flight, it being implied in Mr. Riley's case that we don't adequately inform them about the use of the equipment. I am trying to show they were informed much more fully than we could have undertaken to inform them. May I proceed, your Honor?

The Court: You may.

Q. Would you compare, if you can, the extent of the briefing that was provided by the military as you observed it at Haneda Airport, with the type of instruction which the stewardess gave?

The Court: Are you going to show that that type of instruction was given to them in this particular instance?

Mr. Karr: I cannot show it in this instance. I can only show the regularity of the procedure.

Mr. Riley: If they can't show it was done in this case, I can't see what all this other has to do with it.

The Court: The objection is sustained.

Q. May I direct your attention to the subject of oil coolers. [971] Have you ever experienced a broken oil cooler in flight? A. Yes, I have.

Q. What did you do when that occurred?

A. We feathered the engine.

Q. Is that matter of a broken oil cooler or oil cooler assembly something which you as a pilot flying a DC-4 can see from the pilot's cabin?

A. Yes, sir.

Q. In the experience you have referred to, where

(Testimony of Donald L. Leonard.)

you had that experience, did you so diagnose it while you were in flight? A. That is right.

Q. And was your diagnosis proved to be correct when you landed? A. It was correct.

Q. Is the matter of an oil cooler failure, the type we are talking about, a particularly uncommon experience in the aviation industry?

A. No.

Mr. Riley: I think counsel is still leading the witness.

The Court: Sustained.

Q. Would you state whether or not that is a common or an uncommon experience in the aviation industry?

A. It is quite a common occurrence, especially in the cold climates such as the northern regions that some of the airlines operate.

Q. What does the temperature have to do with the occurrence? [972]

A. It congeals the oil, makes it heavier, and the high pressure under which it operates has a tendency to induce ruptures in the core itself. Also, the ice breaking off of the props, or slush and ice coming off the gear somewhere, will have a tendency to do damage to the front of the oil cooler core itself, physical damage.

Q. Would you say that it is or is not possible to differentiate when you are flying the plane between a leak caused by a break in the oil cooler assembly, as distinguished from a leak from the engine?

(Testimony of Donald L. Leonard.)

A. I believe it is quite easy to distinguish between them.

Q. Can you tell us how?

A. The oil cooler assembly hangs well forward on the engine, while directly beneath it—it is completely enclosed in its own housing and shell, so that it is isolated from the rest of the power package; and an oil leak up in the engine in flight, the air flowing through the engine will drag the oil back to the back of the engine or over the top of the wing, or down through the oil drain line towards the back of the nacelle; where an oil cooler failure, in the oil cooler assembly area, will flow out around its own housing.

Q. When one is in flight at night, would one be able to determine a break in the oil cooler assembly, would you say?

A. Yes, sir. We have very adequate light available to us [973] to inspect the entire engine and oil cooler assembly.

Q. What type of lighting is that with reference to a DC-4?

A. We are required to carry individual flashlights, plus the wing lights that can illuminate the entire top surface, leading edge, of the wing, plus an Aldis lamp that is a very intense bright light.

Q. All of those facilities are available, then, for inspection of a break of this kind, are they?

A. Yes. Actually, any one of the three generally will be adequate to ascertain the problem.

Q. May I direct your attention to the subject

(Testimony of Donald L. Leonard.)

of the airport at Annette on the night of the accident. In the course of your investigation, have you determined whether or not it was reported to Captain Pfaffinger that Annette was below minimums as he was flying southbound?

Mr. Riley: That question is leading, calls for a hearsay answer.

The Court: The objection is sustained. You should ask him did he have information about it, and if so, what it was.

Q. Did you in the course of your investigation learn what the condition of the Annette airport was as Captain Pfaffinger was southbound with reference to whether or not it was above or below minimums? A. Yes. [974]

Mr. Riley: I think it is still leading.

The Court: The objection is overruled.

Mr. Riley: I believe it still calls for a hearsay conclusion.

The Court: I am not so certain about that.

Mr. Karr: I haven't asked what he determined. I asked him if he did determine it.

The Court: The Court has not ruled anything out yet. That was the last question?

Mr. Karr: Yes, your Honor.

The Court: You may proceed.

Q. Do you know what the question was?

The Court: Read the question.

(Last question read by reporter.)

A. Yes, sir.

Q. What did you learn about that in your in-

(Testimony of Donald L. Leonard.)

vestigation? A. That the weather was——

Mr. Riley: If the Court please——

The Court: Just the results of it, please.

A. That the weather was below minimums at Annette. Is that brief enough, sir?

The Court: That is sufficient.

Mr. Riley: It seems to me that should be stricken. He wasn't there. He discovered it from someone else, and he is reporting the conversation with someone else. [975]

The Court: The objection is overruled.

Q. By minimums, what do we refer to in the aviation industry?

A. The landing or takeoff minimums of Civil Air Regulations, or a law to the pilot under which he can operate.

Q. What specifically do we refer to as minimums? Minimum of what?

A. Minimum ceiling and visibility.

Q. Ceiling has reference to what?

A. The height of the base of the clouds above the ground.

Q. And visibility?

A. Is the horizontal distance that you can discern an object.

Q. When the conditions at an airport are reported to a pilot as below minimums, was it permissible under NWA procedures for him to have attempted a landing at Annette? A. No, sir.

Q. Would it have been permissible with the conditions reported to him at Annette as below mini-

(Testimony of Donald L. Leonard.)

mums, would it have been permissible under CAA procedures for him to have attempted a landing at Annette? A. No, sir.

Q. What would have been the consequences had he done so in violation of both NWA and CAA procedures?

The Court: If you know.

A. The consequences generally would be the revocation of his pilot's license. [976]

Q. May I direct your attention to the safety equipment or crash and firefighting equipment at the two airports, Annette and Sandspit. Are you in general familiar with the equipment at both such airports? A. Yes, I am.

Q. What if any crash or firefighting equipment was there at Annette Island on January 19, 1952?

A. None.

Q. What if any crash and firefighting equipment was there at Sandspit at that time?

A. None.

Q. With reference to Coast Guard facilities, was there a Coast Guard facility in the vicinity of Annette Island? A. Yes, there was.

Q. What equipment did it have?

A. The equipment consisted of two approximately 18 foot rowboats and two amphibian-type aircraft.

Q. Where was this Coast Guard station located with reference to the airport?

A. Approximately four or five miles from the airport.

(Testimony of Donald L. Leonard.)

Q. And were the rowboats you have referred to at the Coast Guard station these four or five miles from the airport? A. Yes, sir.

Q. Referring to the amphibian equipment, I think you said there were two amphibian aircraft at the Coast Guard station? [977] A. Yes.

Q. Do you know whether those aircraft were usable for night work?

A. No, they were restricted to daylight, visual flight rules only.

Q. On a night such as the one when this accident occurred, was aircraft operation possible on visual flight rules even if they had not been restricted to daytime operation? A. No, sir.

Q. Assume that both airports, Annette and Sandspit, were above minimums—that isn't the evidence as to Annette, but I ask you to assume for the purpose of this question that the landing conditions at Annette were above minimums; take into account the safety and rescue equipment which existed at both airports; suppose that you were flying on instruments at night with one engine feathered, as Captain Pfaffinger was; and that you were roughly equidistant from Annette and Sandspit: which is the more suitable airport to select for a landing, taking into account all those considerations? A. I would say Sandspit.

Q. Why?

A. Because of the approach procedure to the airport, the final approach pattern and the missed approach procedure.

(Testimony of Donald L. Leonard.)

Q. In what respect do you consider Annette inferior? [978]

A. Annette has some hills approximately 3,000 feet high within about three miles of the airport, just about three miles from the airport, and they constitute quite a hazard under wind conditions. It gets very turbulent there, and these hills have been a constant source of headache to air travel through the Annette area.

The Court: The Court will be at recess ten minutes.

(Recess.)

The Court: You may resume the interrogation.

Q. In the course of your period at Sandspit immediately following the accident, did you have an opportunity both to examine the airport there and inform yourself as to its condition?

A. Yes, sir, I did.

Q. What would you say as to whether the landing conditions at Sandspit on the date of this accident were or were not normal for landing conditions at that time of year and that sort of territory?

A. I would say they were normal.

Q. May I direct your attention to the matter of emergencies. Is there a distinction between an actual emergency, as that term is used in airplane flight, and a potential emergency?

A. Yes, there is.

Q. Can you explain that for us? [979]

A. An actual emergency is when you are in serious trouble and must do something immediately,

(Testimony of Donald L. Leonard.)

that you are on fire or have lost more than two engines or something is very structurally wrong with the airplane. A potential emergency is when you have some malfunction that, combined with something else additional, could put you in that condition.

Q. By "that condition," you mean what?

A. In the emergency condition.

Q. In what category does three-engine operation fall as between potential emergency and actual emergency?

A. It is a potential emergency.

Q. What if any training is a pilot given in three-engine operation with Northwest Airlines?

A. He is given extensive training during his original training periods. Then every six months during his proficiency check ride by CAA check pilots, he must demonstrate his ability to adequately operate the airplane on both three and two engines.

Q. You say those checks come how frequently?

A. Every six months.

Q. Is the occurrence of three-engine operation a particularly unusual one or not, in airline operation?

A. No, it is a daily operation, I'd say, in the airline industry.

The Court: Did the pilot of this plane survive the [980] accident?

The Witness: No, sir.

The Court: You are like the rest of us, then. You have no knowledge from any record he made

(Testimony of Donald L. Leonard.)

or from any statement he made as to what his problems were at the time of his landing? You have nothing from him that reflects what was in his mind as to his conception of the problem that he was working with when he was attempting the landing?

The Witness: No, sir, we don't.

Q. Was it the practice, Captain Leonard, in the airline to notify the passengers when you simply had a potential emergency in flight?

A. No, it wasn't.

Q. Under CAA procedures, was the pilot required to notify the passengers of a potential emergency? A. No, sir.

Q. Under such CAA procedures, was it even recommended by the CAA that the passengers be notified of a potential emergency? A. No, sir.

Q. Now, with reference to the use of this word emergency, I would like to call your attention to an airport chart of the Sandspit airport, Plaintiffs' Exhibit 31. Are you familiar with that chart? [981] A. Yes, sir.

Q. You have seen that chart before, haven't you? A. Yes, I have.

Q. What does the word "emergency" on an airport chart as appears on Plaintiffs' Exhibit 31 indicate?

A. It is merely a classification of that airport for the type of—we have different classifications of an airport, and this is just a classification, one of the classifications.

(Testimony of Donald L. Leonard.)

The Court: What is it you call that Plaintiffs' Exhibit 31?

The Witness: This is a range procedure chart.

The Court: What is the entire thing?

The Witness: It is copies from Northwest Airlines Operations Manual.

The Court: Is it a compiled flight manual purportedly used by Northwest Airlines?

The Witness: It is part of it, yes, sir.

The Court: It is part of a manual, is that right?

The Witness: Yes, sir.

Q. We have been talking about emergency and potential emergency experienced in flight. Does the use of the word "emergency" on the chart that we have been referring to, where there is an airport illustrated, have any relationship to the use of emergency and potential [982] emergency as describing certain characteristics encountered in flight? A. No, none whatever.

Q. Does the word "emergency" on an airport chart of the type we have referred to showing Sandspit have any relationship to the character of a flight, or the experiences in flight that are encountered, that can land at that airport?

A. No, they do not.

Q. The words are used entirely differently, is that correct?

A. It is merely an unfortunate classification of an airport.

The Court: To what, specifically, did your last answer refer?

(Testimony of Donald L. Leonard.)

The Witness: The word "emergency," sir.

The Court: It doesn't mean anything to you, is that what you mean?

The Witness: No. It merely means to me some other airport than our normal terminals, alternates, provisionals, or refueling. That could just as well be "all others" on there as "emergency."

Q. Referring to the subject of lifesaving equipment, are you familiar with the type of life vests that were installed on the DC-4 airplanes operated by Northwest Airlines? A. Yes, sir.

Q. Where were they located? [983]

A. Normally in the overhead hat rack.

Q. By "normally," what do you have reference to? Were there some occasions when they weren't?

A. There was some configurations where there was no hat rack above some seats, aft of the main cabin door, so they were put on the side wall.

Q. Can you tell us whether that means a couple of seats, or four seats, or are we talking about a major part of the airplane?

A. Generally only one or two seats, double seats, that is.

Q. With the TWA DC-4, where were the life vests located? A. Overhead in the hat rack.

Q. Same hat racks as in the NWA plane, same location of—— A. Yes, sir.

Q. Are you familiar with where the life rafts were located in the two types of DC-4, that is, the kind owned and operated by Northwest Airlines as distinguished from the type Northwest Airlines

(Testimony of Donald L. Leonard.)

rented from TWA? A. Yes, sir.

Q. Where were the life rafts located on the Northwest Airlines owned planes?

A. Usually were mounted directly forward of the main cabin door and directly adjacent to it. However, there were some exceptions to that where they were mounted just aft of the main cabin door and adjacent to it. This was merely [984] the width of the door that would separate the location of the cabinet, approximately three feet. There was spots on the floor, tie-down holes in the floor where they could be fastened, just a matter of turning the cabinet around so it would face the door in all cases.

Q. What if any difference was there in the cabinets that contained the life rafts in the Northwest Airlines planes as distinguished from the TWA chartered planes?

A. As best I could tell, they were identical.

Q. What if any instruction was given to Northwest Airlines pilots on both the location and the use of life rafts?

A. There was a very complete instruction given to all crew members, including the pilots, when you first were assigned to overseas duty. Then there was a recurring training every six months. You were required to go in and put in a full day in training session. One of these sessions would be classroom drill. We would have a raft inflated, along with the emergency equipment from the raft, life vests, emergency radios, all out on the floor

(Testimony of Donald L. Leonard.)

of the classroom, and all crew members had to participate in demonstrating the use of them and in showing their knowledge of these components. Usually there was some movies or other drills given in the classroom, along with a test.

The other six months drill was what we call a wet drill. We would go out to a lake near the airport and [985] actually take the life vests and life rafts and inflate them in the water, and would utilize all of the emergency equipment on the raft to show that we knew how it functioned and what it was for, and that we could remain up to date with it.

Q. Was that type of regular training every so many months given to pilots only, or to whom else in the airline organization was it given?

A. Given to all crew members, pilots, co-pilots, flight engineers, navigators, stewardesses, pursers, flight service attendants, etc.

Q. Did each of these various members of the crew have this type of instruction with the same frequency, every six months?

A. Yes, they are required by company regulation to have this every six months, or they are not qualified to fly on overseas trips.

Q. Apart from the matter of instruction on use of such equipment at these regular instruction periods, what if any attention was a pilot required to pay to the location of such equipment in a plane when he flew it?

Mr. Riley: I object, your Honor. He is consist-

(Testimony of Donald L. Leonard.)
ently leading the witness. The material is entirely irrelevant, anyway. It hasn't been shown to relate in the least bit to this aircraft. This man hasn't stated he trained this crew. He is resorting to irrelevant hearsay he has [986] gathered on behalf of the company. I can't see it is serving any worthwhile purpose.

The Court: Is there any response?

Mr. Karr: We are entitled to show what training and what procedures are followed in connection with the use, the location and the knowledge of lifesaving equipment. I am proposing to show through Captain Leonard, an experienced pilot, just what procedure a pilot follows, by requirement, each time he boards a plane as a crew captain, regular company procedure.

The Court: You may do that. You may or may not profit thereby, but connect it up with what was done in this case. Proceed.

Q. Can you tell us the procedure in that connection?

A. Yes, sir. When the crew reports to the airplane, they report at least twenty minutes prior to the boarding of the passengers or scheduled departure time. The captain then organizes his entire crew at the aircraft and runs a physical and oral quiz with all his crew members so that he is sure that they all know the emergency equipment on board the airplane, its proper location, how to use it, they all know their designated stations in different types of emergency, that they all have

(Testimony of Donald L. Leonard.)

checked the equipment which they are assigned to make sure it has been overhauled within its time limits, and runs a general [987] emergency drill to familiarize all of his crew with his own emergency procedures.

Q. What is that procedure or practice called?

A. It is called a briefing.

Q. And with what frequency is that done?

A. It is done prior to the departure of the crew for each trip.

Q. Now, you said that they checked the equipment to see whether it was within limits, I think was your reference. What do you mean by that?

A. Each life vest and life raft is required to be overhauled and reinspected periodically, so we checked the cards on the equipment to make sure it is within its proper periodic inspection time.

Q. Does that checking occur either by the pilot or someone else under his direction before each departure?

A. Yes, sir.

The Court: By that, you mean it is supposed to be, do you not?

The Witness: No, sir. I mean it is done.

The Court: How do you know?

The Witness: A captain gets on the airplane with his crew. The crew members are there with him. He asks them, "Where is the life raft?" The crew member must go to the life raft and show him where it is. He asks them, "What is the date on it?" [988]

The Court: How does the president of the com-

(Testimony of Donald L. Leonard.)

pany know if you will do that? Someone might overlook it sometime, might he not?

The Witness: Yes, they might. They could overlook anything, I suppose, sir.

The Court: You may proceed.

Q. With reference specifically to the life rafts on this plane, did you see them at any time during the period of ten days or two weeks you were at Sandspit following the accident?

A. Yes, I did.

Q. Tell us when and where you saw them, as nearly as you recall.

A. There were three life rafts on board. The ten-man raft was partially protruding from the cockpit window. Another part of it was protruding from the astrodome and was secured some way to the inside, was shackled so you couldn't pull it out. The two twenty-man rafts were recovered subsequent to the accident on the beach.

Q. How long after the accident, do you recall?

A. I believe it would be recovered, the first one, on Monday following the accident, two days following the accident; and the other one, I believe, was the following day.

Q. How did they reach the beach, by the way?

A. They floated in on the tide.

Q. At the time they floated in to the beach on Monday and [989] Tuesday following the accident, had the cabin portion of the plane disintegrated to any appreciable extent at that time?

A. Not that I could tell, no, sir.

(Testimony of Donald L. Leonard.)

Q. When they were recovered on the beach, were they or were they not inflated?

A. They were not inflated. They were intact in the original stowage packages.

Q. Was examination made to see whether they would inflate?

A. One of them was inflated upon its return to the States. The other one, I don't know what its disposition was.

Q. There was some testimony, I believe it was this morning, with reference to the problem, if it is a problem, of landing an airplane with a frozen rudder tab. Would you be able to comment on whether or not a frozen rudder tab would make it harder or easier to land the airplane?

A. I would say it would make the landing easier.

Q. Why would that be?

A. When you are normally flying on three engines, you apply a rudder tab correction to trim the airplane out so it will fly hands off. Your reason for this is because of your unbalanced power. As you reduce your power to symmetric power again for your landing, you must re-trim the airplane for symmetric power, and if your rudder tab was frozen in neutral position for landing, you wouldn't have to make [990] this additional rudder tab correction.

Q. There has been testimony in the last day or two about the plane approaching the airport at Sandspit, being, let's say, a mile from the airport at an altitude of 800 feet, more or less, and the speed

(Testimony of Donald L. Leonard.)

of descent which might then be necessary to come into the airport and make the landing. Can you comment on that subject?

A. In this specific case, they had ten miles visibility, so I don't believe it was a problem.

Mr. Riley: There is no such evidence in the record, that there was ten miles visibility.

Mr. Karr: May we see Plaintiffs' Exhibit 6, your Honor?

Mr. Koch: A-5 and 6, I believe it is. We need the exhibit, the flight accident report of Smith. It was a defendant's exhibit, but was introduced by the plaintiff, a multigraphed, two-page exhibit.

Mr. Riley: It wasn't introduced by the plaintiff. It was introduced over plaintiffs' objection, on cross examination of Mr. Smith by Mr. Koch.

The Court: What number do you think it is?

Mr. Riley: A-5 is the position log.

Mr. Koch: I think it is A-18, your Honor.

The Court: What do you call that exhibit, Mr. Koch, a one-word name?

Mr. Koch: Accident report. [991]

Mr. Karr: Can Exhibit A-18 be shown to the witness?

The Court: It will be shown to the witness.

Mr. Riley: Could I see that?

The Court: Yes.

Mr. Riley: I'm sorry, your Honor. There seems to be a difference in the two copies I have than the one here.

The Court: What are you looking at?

(Testimony of Donald L. Leonard.)

Mr. Riley: This is a copy of Mr. Smith's report I obtained from the CAB.

The Court: It is not in the record, is it, that thing you hold in your hand?

Mr. Riley: No, your Honor.

The Court: Proceed. What does the clerk's record show with respect to Defendant's Exhibit A-17 as to admission of it?

The Clerk: That has not been admitted, your Honor.

Mr. Karr: Shall I proceed, your Honor?

The Court: You may do that. I wish you would expedite it, bearing in mind the estimated time.

Mr. Karr: I will do my best.

Q. You have just been handed Defendant's Exhibit A-18. At the top of the second page of that exhibit, is there material there from which you can tell what the visibility was at Sandspit?

A. Yes, there is. [992]

Q. What does it indicate that visibility was?

A. Ten miles visibility.

The Court: That is shown on that accident report, is it?

The Witness: Yes, sir.

The Court: Which is Defendant's Exhibit A-18. At the top of the second sheet of paper, which is the sheet on which the one making and signing the report, Mr. C. E. Smith, is purported to have signed it—have you copies of that?

Mr. Karr: No, your Honor.

(Testimony of Donald L. Leonard.)

The Court: I ask the witness to read the entire second line.

The Witness: It reads, "Sandspit, at 190930 Zebra"—that means the 19th day of the month, at 0930 Zebra or 0130 Pacific Standard Time—"E" means estimated——

The Court: Read it literally. Then go back and explain it.

The Witness: "E 25 OVC 10 974 34/30 SSW 10 944 ST 10".

The Court: 10? To what subject does that refer, if you know?

The Witness: That refers to a stratus deck at 1,000 feet. "Brks" is the last.

The Court: Will you point out the figures which [993] relate to the visibility, the distance one's eyes could see without serious obstruction in the atmosphere?

The Witness: Yes, your Honor. After the letters "OVC", the numbers "10" signify the visibility at that station.

The Court: "10", is it?

The Witness: Ten miles.

The Court: You may inquire.

Mr. Koch: May we have Plaintiffs' Exhibit 38?

The Court: That is referred to heretofore as the flight superintendent's log, a copy. You may proceed.

Mr. Karr: I don't intend to ask about that exhibit at this time.

Q. With the aid of the information which you

(Testimony of Donald L. Leonard.)

have received as to the ten miles visibility at Sandspit, would you now proceed to tell us what you were going to about an approach to the airport from one mile out when you were at an altitude of 800 feet?

The Court: When did this occur?

Mr. Karr: This relates to testimony which was given, I believe, either——

The Court: By this witness?

Mr. Karr: No, by a prior witness, by Captain Cox.

The Court: Why are you entitled to have him comment on Captain Cox' testimony? [994]

Mr. Karr: I am not having him comment on that testimony. I would like him to explain the approach to the airport if one is at an altitude of 800 feet, one mile out, whether it is a direct or indirect approach, and to explain——

The Court: It might be that two different pilots might work out the problem in different ways. Proceed.

Q. Could you explain that?

A. Yes. With the situation you are speaking of, one mile out with 800 feet, like your Honor says, it could be worked out any way with different pilots, but it isn't a bit unusual for a final approach to an airport, in the last one mile, to descend at rates up to 2,000 feet per minute before your last flareout, or you have ways of making your turn in or an S turn to the airport. There is many different ways you

(Testimony of Donald L. Leonard.)

could lose this altitude without any undue operational problems.

Q. When you say an S turn, what do you mean by that?

A. Rather than proceeding straight from your one point to the end of the runway, you could do it in a series of gentle turns.

The Court: Before you touched the runway?

The Witness: Yes, before you get to the last thousand feet from the airport, is all you are required to remain straight and level. [995]

Q. Depending on the extent to which you made an S turn or curved in approaching the airport, your rate of descent would be decreased, would it?

A. Yes, sir.

Q. Referring to, more specifically, your return to Sandspit in June of 1952, I would like you to direct your attention to that event. I think you said you were there from June 8th to June 10th, or thereabouts?

A. Yes, sir.

Q. Were you present in January of 1952 at the time salvage activity was undertaken in connection with the airplane?

A. I was.

Q. What was done with a view to trying to salvage the plane, in general?

A. We hooked onto it with some fishing boats, attempted to tow it to a beaching site.

Q. What success was had in the effort to tow the plane from the place where it was at rest in the water?

A. We towed on it for approximately six hours

(Testimony of Donald L. Leonard.)

in three different directions; yet we didn't move the airplane, I believe, 100 feet in the total of the three directions.

Q. Were further efforts made to move the plane after these first efforts were abandoned, to tow it at any other time? A. No, sir.

Q. In moving it the 100 feet, more or less, that you referred [996] to, was it moved closer to shore or away from shore or what would the situation be in that respect?

A. I would guess, at the best, parallel to the closest shore line.

Q. In other words, was it closer to shore after the towing or farther or approximately the same?

A. Approximately the same distance.

Q. What was the general character of the beach?

A. The beach was very rocky, rough, pitted with large holes and large boulders, some the size of a two-story house.

The Court: Was that condition known to you before you went there and looked at it?

The Witness: No, sir.

The Court: It wasn't known to you from any records you had studied in your experience as a pilot?

The Witness: No, sir.

Q. What was the general position of the plane when salvage attempts were abandoned in January, 1952, with reference to the shore?

A. It was generally pointed in a northwesterly

(Testimony of Donald L. Leonard.)

direction. I mean, the tail of the airplane was pointed in a northwesterly direction, approximately half a mile off shore.

Q. When you returned in June of 1952, in what position was the plane?

A. It appeared to be exactly the same location, and facing [997] the same direction.

Q. Could you tell us what the weight of the plane would be, approximately?

A. When it took off at Anchorage, it weighed roughly 69,000 pounds, and had burned off roughly 2,000 pounds of fuel, so probably around 67,000 pounds, with the water.

Q. Would its being in the water result in the plane being heavier or lighter?

A. Undoubtedly make it heavier, with the water replacing the fuel, and with the water soaking all the interior of the airplane, such as the rugs and seats and the upholstery, it would undoubtedly make it heavier.

The Court: Did you conclude that the fuel space had been replaced with water?

The Witness: Yes, there was extensive fuel in the water throughout the duration——

The Court: How do you know it was replaced by water? Did you look into the fuel tanks?

The Witness: No. That is just the normal sequence, your Honor, that the water is heavier than fuel, so wherever it can get in or gasoline can get out, the water will replace it. It is roughly two pounds heavier per gallon than your fuel is.

(Testimony of Donald L. Leonard.)

Q. What sort of a beach or bottom area was the plane resting on, Captain? By that, I mean was it sandy, rocky, or—— [998]

A. It was gravel, all gravel. The entire run-off area of the tide was all gravel, rocks, sand.

Q. Where the plane was situated when you returned in June, was it sitting on top the sand, or was it buried to some extent?

A. The inboard engine nacelles were buried to the bottom skin of the wing, and the bottom of the airplane was disintegrated and gone. Otherwise, the bottom surface of the wing was resting on the top of sand and rocks.

Q. To what extent were the nacelles buried?

A. Approximately 18 inches, the tip of the nacelles.

Q. Were you out to the plane when you were at Sandspit in June, 1952? A. I was.

Q. On more than one occasion? A. Yes.

Q. How did you get out to the plane?

A. We walked out to it.

Q. You mean it was out of the water?

A. Yes, sir.

The Court: When did you do this?

The Witness: The morning of June 9th.

Q. Was the entire plane out of water at that time?

A. What was remaining of the airplane was out of water. There was a large puddle of water roughly fifty feet in diameter, [999] and I imagine two or two and a half feet deep. There were large

(Testimony of Donald L. Leonard.)

depressions in this run-off area there from the cockpit area, and the top section of the airplane was lying in this pool.

Q. I mean so far as the edge of the water is concerned, the tidal edge, was that beyond the plane or where?

A. Yes, sir. The tidal edge, as best we could ascertain, would be about 75 feet from the center of the airplane.

Q. That is when you were there in June?

A. Yes, sir.

Q. In connection with the various steps you have taken in the investigation of this accident, have you devoted attention, among other things, to the study of the nosewheel assembly? A. Yes, sir.

Q. What was the purpose of your return in June, 1952?

A. Our primary cause for the return was to make a study—make some recommendations to several of the stations along the route regarding communication procedures, and we also made the trip to the aircraft wreckage site at the same time.

Q. In the course of your studies and investigation of this accident, apart from studying the nosewheel assembly, did you also check on the nosewheel well and the doors of that well?

A. Yes. During the original examination of the airplane the first morning I arrived at the scene, we noticed that the [1000] left front nosewheel door was buckled and bent out. That was the only ab-

(Testimony of Donald L. Leonard.)

normal configuration with the nose at that time we noticed.

Q. So that we will have it in the record, what do you mean by nosewheel well?

A. The nosewheel well is a narrow opening in the nose of the airplane that the nosewheel fits up into as it retracts, and the nose gear doors close in behind it and completely enclose it.

Q. Can you tell us approximately what size those doors are?

A. About eight feet long, about 14 or 16 inches wide.

Q. How many of them are there?

A. Two, one on each side that close together.

Q. From your investigation of the accident, your study of the plane and the other investigation you have made of this accident, have you been able to reach a conclusion, in your judgment, as to the possible or probable cause of the plane going into the water?

A. Yes, sir.

Q. What is that conclusion?

A. We determined from the——

The Court: Just say what your opinion is, without any explanation at all. Just state it.

A. The inability to completely retract the nose gear, causing it to extend into the slipstream, plus the doors bent in [1001] the slipstream, caused enough increased drag on the airplane that he was unable to fly it.

Q. Would you explain for the benefit of all of

(Testimony of Donald L. Leonard.)

us, Captain, what facts you found which led you to that conclusion?

A. The marks on the nose gear strut; the way the up latch was torn from its assembly mountings; the subsequent experiences we had with nose gears and retraction problems of them in cold weather conditions, led to this further investigation that proved the facts we brought out.

Q. Was the matter of the nose gear failing to fully retract a matter of maintenance in the operation of airplanes by Northwest Airlines, or was that a matter or design in the initial construction of the nose gear?

A. It was a matter of design.

Q. Was that design subsequently changed by Douglas Aircraft Company?

A. Yes, sir.

Mr. Karr: May I have a moment to confer, your Honor?

The Court: You may.

Mr. Karr: You may examine.

Cross Examination

Q. (By Mr. Riley): As a matter of fact, isn't the real reason this airplane crashed and was unable to get into the air the fact that [1002] the No. 1 engine was dead?

A. No, sir.

Q. As a pilot, and I am a pilot and you are a pilot, are you sitting there and testifying that this airplane can take off as well on three engines as it can on four engines?

Mr. Karr: I object to the question in which counsel announces his talents in the aviation field.

(Testimony of Donald L. Leonard.)

The Court: The objection is overruled. I understood he was stating, in effect, a supposititious question.

Mr. Riley: May I redraft it?

The Court: Strike the question.

Q. Is it your opinion, Captain, that a Douglas DC-4 can take off on three engines just as well as it can, and in the same runway space, on three engines as it can on four? A. No, sir.

Q. You testified that the absence of the rudder tab—a frozen rudder tab would make a landing on three engines easier? A. Yes, sir, I did.

Q. Are you going to state that would make it easier on a wave off?

A. It wouldn't make much difference on the wave off, on the original wave off.

Q. As a matter of fact, the loss of the No. 1 engine in a Douglas DC-4 is the most critical of all four engines, [1003] isn't that a fact?

A. There is very little difference.

The Court: As I have suggested before, try to have in mind that if you wish to ask a question, every word in it is important to be heard by everyone.

Mr. Riley: Thank you, your Honor. It is easy to get exercised.

The Court: That is a bad thing to do. It always defeats the one who does it.

(Copy, Normal Operating Procedures, marked Plaintiffs' Exhibit 39 for identification.)

(Testimony of Donald L. Leonard.)

Mr. Riley: Could the witness see Plaintiffs' Exhibit 29?

The Court: Has opposing counsel seen this?

Mr. Riley: No, your Honor.

The Court: Let it be shown to opposing counsel.

Mr. Karr: Your Honor, the paper which counsel has asked be shown to the witness, I understand is not an exhibit in the case. I think it has been offered, but rejected.

The Court: I understood it had not been admitted. I understand the exhibit under study is the one which the Court now holds in hand, and that is Plaintiffs' Exhibit 39 for identification. It has not been received in evidence. I ask if counsel are aware of the identity of this exhibit. [1004]

Mr. Karr: We know in general of the contents, what it contains.

The Court: Have you seen it?

Mr. Karr: Yes, we have.

Mr. Koch: A different copy of this marked exhibit has been rejected already in this case. This is a different copy that is being re-marked.

The Court: There is no need of it, unless you have some——

Mr. Riley: That is true, the defendant's copy of that document was previously rejected, and I wanted to use them.

The Court: What one corresponds to that?

Mr. Riley: It was previously offered as Plaintiffs' Exhibit 34.

The Court: It has been called Northwest Air-

(Testimony of Donald L. Leonard.)

lines manual. Why can you not use the copy you used there which was rejected, if you wish to ask this witness some questions in further authentication.

Mr. Riley: I called for it this morning. It isn't here. It was from defendant's records.

The Court: Exhibit 34, as I understand it, cannot be located.

The Clerk: I have it here, your Honor.

The Court: Let me see both exhibits. The Court [1005] directs that what has been marked Plaintiffs' Exhibit 39 for identification be withdrawn and returned to counsel who produced it, and the Court refers to examining counsel for his use Plaintiffs' Exhibit 34, which has been rejected.

Q. Referring to what has been marked Plaintiffs' Exhibit 34, are you familiar with this portion of the Northwest Airlines operating manual?

A. Yes, sir.

Q. Would you state what portions of the airlines manual this consists of?

A. It is part of the DC-4 operating manual.

Q. And I will ask you what the minimum take-off weight is for a three-engine takeoff as prescribed by the Northwest Airlines operating manual for DC-4 aircraft?

Mr. Karr: I object.

Mr. Riley: Strike that. I overlooked that this exhibit has not been identified.

Q. Does this exhibit provide the minimum take-off weights for a DC-4?

(Testimony of Donald L. Leonard.)

The Court: Mr. Riley, do not let him answer a question that depends upon the truth to his referring to the contents of this exhibit, except those formal things like its date, what kind of information is contained in it or who issued it, if anybody did, or to whom it was addressed or [1006] who wrote it, or something like that. Any other kind of question relating to comments is not appropriate at this stage.

Mr. Riley: I will withdraw the question.

Q. Would you state what part, if any, of DC-4 aircraft operations does this exhibit deal with?

A. It is several different parts. Do you want me to give you all of them?

Q. Will you state whether or not it deals with three-engine operation?

A. It deals with three-engine ferry operation.

Q. Is there any other part of the manual that deals with three-engine operation of DC-4 aircraft?

A. Here is a part with engine failures and restart, pull out and go around.

The Court: Does it concern a DC-4 using only three engines?

The Witness: The engine failures would, yes, sir.

The Court: Does that exhibit refer to that subject, how to use or what to do in a situation involving the use of the plane with only three engines operating?

The Witness: It has emergency operating procedures.

(Testimony of Donald L. Leonard.)

The Court: Does it have anything to do with the operation of the plane under those circumstances?

The Witness: Yes, sir, it does. [1007]

The Court: You may inquire.

Mr. Riley: I re-offer Plaintiffs' Exhibit 34 as evidence on behalf of the plaintiff.

The Court: As bearing on what issue?

Mr. Riley: As bearing on the necessity for operating rudder trim tabs; as bearing on minimum takeoff weights.

The Court: On the minimum required?

Mr. Riley: Takeoff air space for DC-4 aircraft operating on three engines.

Mr. Koch: If the Court will permit me to make the argument, since Mr. Karr was not here when the matter came up before——

The Court: If it will expedite the matter, the Court makes the exception.

Mr. Koch: Your Honor, this matter, by the title on the front page, deals with a three-engine ferry operation. When this exhibit was offered before, Mr. Cox explained the flight in question was not a three-engine ferry operation, that a three-engine ferry operation dealt with taking a plane that only had three operable engines, empty, to another airfield or another station. This is not that situation. In that case, they prescribed low minimum weights, because there is no cargo load and the trips are short. Mr. Cox pointed out at that time that the rules dealing with engine-out operation—— [1008]

The Court: We are not concerned with Mr. Cox'

(Testimony of Donald L. Leonard.)

proof. We are concerned with this witness' proof.

Mr. Koch: The exhibit itself deals with a three-engine ferry operation that is taking off from a standing start and delivering an aircraft that has only three engines to another point. Here there was a landing, not at a dead stop, but at fairly high speeds, slightly high, slightly fast. These rules—the proffered exhibit does not deal with a situation where the plane that attempts takeoff is moving when it begins. It starts in speeds in excess of 100 miles an hour. The takeoff maximum weights are not applicable, and this exhibit would only prove misleading, because it is not applicable to the facts at hand.

The Court: I would like you to adduce proof that supports your contention that it does relate to the kind of three-engine operation of the kind of plane that was in operation at the time of this accident. Proceed. The Court will suspend ruling until there is further evidence.

Q. To your knowledge, are there any other operations manuals provisions covering three-engine operations promulgated by Northwest Airlines dealing with three-engine operations of DC-4's?

A. Yes, sir.

Q. Are there any other than those which are contained in [1009] Plaintiffs' Exhibit 34?

A. I don't know. I didn't get to study it all.

The Court: Will you let him have that exhibit? Will you look through that exhibit and see what type of operations it applies to, and after you have

(Testimony of Donald L. Leonard.)

done so, I wish you, if Counsel is familiar with the form of proper questions, to ask this witness his information as to whether this exhibit relates to the operation of the kind that was here described as the kind here involved, the operation in flight carrying passengers on this four engine plane with only three engines operating.

Q. Would the safety factors incorporated in Northwest Airlines operating procedures for empty aircraft in ferry conditions be less or greater than those established for three-engine operation of an aircraft loaded with forty passengers?

A. It is a different type of operation than three-engine ferry operation.

Q. I will ask you to answer my question. Would the safety requirements be less or greater for a loaded airplane than they would for an empty airplane?

A. I would say we use the same caution on each, sir.

Q. I think that ordinarily——

The Court: Do you mean to say that that is the practice or not the practice to do so? I do not understand the import of your meaning. [1010]

The Witness: If I may, sir——

The Court: Just relate it to the existence or non-existence——

The Witness: Three-engine ferries are done only by specialists in the field, only by test pilots and not by regular line pilots. It is a very specialized operation of taking an airplane such——

(Testimony of Donald L. Leonard.)

The Court: Here the inquiry is not that. The inquiry is relating this operation to the standard of safety conduct applicable to the ferry operation. That is the subject matter of inquiry before you. Now, will you try to hold the questions in proper form, and the witness' attention to that circumstance in the questions you ask him. You may ask him other questions, and I am going to have to restrict you, because we are taking up too much time on this.

Mr. Riley: I am sorry to take up so much time. I would rather proceed to others, but——

The Court: Proceed. I wanted to tell you what you are doing.

Q. Are the safety provisions incorporated in three-engine ferry operations the same as those you would expect to use in ferrying on three engines an airplane with forty people aboard it?

A. I don't understand your question. [1011]

Q. If you were prescribing three-engine regulations relating to the operation of a Douglas DC-4, would the three-engine operating provisions of a Douglas DC-4, assuming the loss of an engine with a cargo of passengers and crew, be less than that you would use in the operation of an empty aircraft in ferry conditions?

Mr. Karr: I object to the question. This is a question——

The Court: The objection is overruled.

A. I am not entirely clear on what the CAR are classifying those two different operations.

(Testimony of Donald L. Leonard.)

Q. Isn't it perfectly obvious, as a pilot, that you would use greater safety with an aircraft with forty passengers aboard than you would in ferrying an airplane on three engines that was empty?

A. We use the same safety precautions with all our flights.

Q. The safety precautions related in Plaintiffs' Exhibit 34 dealing with three-engine ferry operation of an empty aircraft would also apply to three-engine operations of a DC-4 loaded with forty passengers, is that right? A. No, sir.

Q. Do you have before you Plaintiffs' Exhibit 29? A. No, I don't.

Mr. Riley: May 29 and Defendant's Exhibit A-5 be shown to the witness? [1012]

The Court: You may.

Q. You mentioned some damage can be caused to an oil cooler by ice breaking off props, is that correct? A. Yes, sir.

Q. That would occur in relatively heavy icing conditions before you would get prop icing of any serious degree, wouldn't it? A. Not always.

Q. Would it be true in general?

A. Yes, in general.

Q. Would you make an S turn to a runway on three engines from one mile out in a DC-4?

A. Yes, sir, if I needed to, to make my approach.

Q. Do you know why this ten-man raft which you stated was protruding from the cabin window and the astrodome of the aircraft wreckage in the

(Testimony of Donald L. Leonard.)

water off Sandspit on Sunday or Monday following the crash of the aircraft, do you know why it was protruding both from the cabin and from the astro-dome? A. Only from the survivors' testimony.

Q. Did you see it? Did you cruise over it?

A. Yes, I saw it there.

Q. Was this raft inflated? A. No, sir.

Q. Could you tell whether it had been inflated?

A. No, sir.

The Court: Did you determine for yourself whether or not the rafts had been used in this landing?

The Witness: No, sir, I couldn't tell.

Q. Would you refer to Plaintiffs' Exhibit 29, the photographs before you? Do you recognize those photographs? A. Yes, sir.

Q. Were you there when they were taken?

A. Yes, sir.

Q. Did you assist, or did you take them?

A. I didn't take them, no, sir.

Q. Does the top photograph indicate the nearest land from the wreckage?

A. No, I believe the nearest land is directly aft of the airplane.

Q. Was the tide out at the time that picture was taken?

A. The tide is coming in in this picture.

Q. Referring to Defendant's Exhibit A-5, I will ask you to read the weather report indicating the weather at Sandspit, on the last line. Read the mes-

(Testimony of Donald L. Leonard.)

sage and interpret it as a pilot, on the last line of page 1 of Exhibit A-5.

Mr. Koch: I object to the question. It isn't within the direct examination.

The Court: I do not wish to extend your opportunity of taking over any further. This was in reference to a [1014] special exhibit. Proceed.

Q. Go ahead.

A. It is Annette relay to Northwest 324 of the 17th. It says, "Terminal forecast your arrival times." That means it is a forecast or prognosis of what it will be when they get there. "Sandspit 2,000 broken to overcast, occasionally light overcast, one mile, light snow."

Q. What does the one mile refer to?

A. That refers to the forecasted visibility.

Q. I will ask you to refer to page 2.

The Court: Of what exhibit?

Q. A-5, and I will recall that you testified that Annette was reported closed. I will ask you read, then interpret, the two messages which are the third and fourth from the bottom of page 2 of Exhibit A-5.

A. The third one first?

Q. The third and fourth from the bottom of the second page of Defendant's Exhibit A-5.

A. The third from the bottom reads, "Annette 806 801 air Seattle N 7995 Fairbanks to Seattle arrived 1148 Zebra." That is 0348 Pacific Standard Time. "Landing Annette pick up boats to ferry Sandspit." Filed to Annette 1119 Zebra.

(Testimony of Donald L. Leonard.)

Q. Would you read the fourth message from the bottom?

Mr. Koch: What time is that? [1015]

The Witness: 0348 Zebra, or approximately three hours and ten minutes after the accident.

Q. Would you read the fourth from the bottom?

A. "NWA 3 Seattle Annette 191138 Zebra." The first word I don't understand. "STMGR Anchorage Northwest Operations Anchorage Seattle N7995 landing Annette in a few minutes to pick up four boats and four outboard motors and ferry to Sandspit immediately to aid in rescue operations." Signed Meyers, STMGR, filed at 191138 Zebra.

Mr. Koch: What time is that?

The Witness: That is 0338 Zebra, just three hours after the accident.

Mr. Riley: I have no further questions.

Mr. Karr: That is all, Captain Leonard.

If the Court please, I am sure your Honor will recall that early in the trial while Mr. Maynard was on the stand we offered what at that time was not a complete record of Mr. Maynard's medical service history. The one that had been furnished was white on black. We have replaced it with black on white, as we promised we would, and if it may be marked we will offer it in evidence at this time.

The Court: Do you wish to ask that it be used instead of the one already marked?

Mr. Karr: I am not sure that one was marked. If it was marked, it was withdrawn. It was A-17, I think. [1016]

The Court: Has A-17 been returned to counsel who produced it?

The Clerk: No, your Honor.

The Court: Let this thing which counsel offers for marking be substituted physically for what previously was marked Defendant's Exhibit A-17. Let this bear the A-17 mark. Delete the clerk's marks from this exhibit which I hold in my hand and return it to counsel who produced it.

Is there an objection other than the previous one; namely, that it did not comply with local rules relating to photostatic background?

Mr. Riley: I have some reservation, because I don't know for what purpose it is offered. If there is something in here that Mr. Maynard should have been examined on, I am concerned about——

The Court: It might have that possibility a thousand times. The Court will not rule upon it now. Counsel will have to confer with each other, if each is in a position to take the other's word about it.

Mr. Karr: If the Court please, if I am not very much mistaken, it was very clear in the record at the time the discussion occurred Mr. Riley had no objection.

The Court: Mr. Riley raises the question as to whether this is a duplicate of the other and the only difference being a white background is being substituted [1017] for something that was a black background, and whether or not this contains some data in it not contained in the other. Counsel will have to satisfy themselves about that.

Mr. Karr: If that is what he wants to know, I will assure him this is a complete photostat of the entire record provided by the Government.

The Court: Look at the two beside each other.

Mr. Riley: If Mr. Karr says that is the case, I am not going to challenge it.

The Court: I understand Mr. Karr to say that this, so far as material words and figures are concerned, is exactly the same as the other; that the only difference is that this is photostatted on white background, whereas in the original A-17 marked for identification as such, it was on black background of photostatic copy.

Mr. Riley: My problem was that I don't know what he intends to use it for. If it is something Mr. Maynard should be cross examined on or if they make reference to his testimony and cite inconsistencies in this record as to which he has not been examined, I think it would be prejudicial.

The Court: The only thing the Court can do about it is to reserve ruling until just before the close of the defendant's case, or reserve the right later to rule upon it. That is all I can do. It seems to me you should have [1018] already had that in mind, crossed that bridge, but the Court will give you a reasonable time.

Mr. Riley: I am sure that this is a copy of the original. I am not challenging that, your Honor.

The Court: The Court's admitting it in evidence does not depend upon whether you have Mr. Maynard here for further redirect examination or not. The Court's duty to admit it is upon its admissibil-

ity, and that is not in any way connected with your having provided yourself with the opportunity to recall for further interrogation by you your client. If there is some further checking you wish to do——

Mr. Riley: No, your Honor.

The Court: The Court now overrules the objection and does admit Defendant's Exhibit A-17 in its present form in evidence. The Court repeats that what previously was marked Defendant's Exhibit A-17 has been withdrawn, the clerk's file marks thereon have been deleted, and that thing has been returned to counsel who produced it.

(Defendant's Exhibit A-17 for identification received in evidence.)

Mr. Koch: I have another exhibit I should like to offer at this time.

The Court: Is it marked?

Mr. Koch: It has not been marked. This is the [1019] certified copy from the Army of the photostats with the seal affixed. They were white on black photostats, in violation of the Court's rule, and in accordance with the Court's direction, I have had black on white photostats prepared and request leave of the Court to substitute black on white copies for those the reverse of which are presently attached to the certificate.

The Court: The clerk, in the presence of both counsel, will accomplish that.

Mr. Koch: We will cut the black ones off and substitute the whites, is my suggestion, your Honor.

Mr. Riley: I haven't the faintest idea where they are, when they got them.

The Court: The Court continues further proceedings in this case until tomorrow morning at 10 o'clock. I do not understand why counsel could not arrange to expedite matters a little more. We have now to inconvenience other counsel who have been waiting on this calendar for two weeks or more, due in part to the inability of counsel in this case to expedite it. The Court does not think it is too commendable. Those connected with this case are excused until tomorrow morning at 10 o'clock, and may now retire.

Mr. Koch: May Mr. Sanders be excused from further proceedings in the case? [1020]

The Court: Is there any objection?

Mr. Riley: Your Honor, I might——

The Court: The Court will decline to do so at this time.

(The Court was adjourned.)

The Court: We will now resume the case currently on trial before the Court. Was there a witness on the stand as to whom counsel had finished interrogating?

Mr. Koch: There was not a witness on the stand, but the Court had before it a proposed exhibit. The exhibit is a certified copy received by the Court from the Judge Advocate of the United States Army, setting forth true copies——

The Court: What was the number of it?

Mr. Koch: I don't believe it has a number yet,

your Honor. We are attempting to substitute the black on white.

The Court: Does the thing which you wish to bring out and put this in the place of have a number?

Mr. Koch: No, your Honor.

The Court: Does anything for which you seek to substitute this have a number?

Mr. Koch: No, your Honor. I would like to offer it to be marked.

The Court: It will be marked.

(Service record marked Defendant's Exhibit A-41 for identification.) [1021]

The Court: I have an indistinct recollection that some reference to another thing already identified was made when counsel yesterday afternoon mentioned this thing you are now speaking of, but perhaps this is not the former identified thing which the Court now is speaking of.

Mr. Koch: I believe that is true, your Honor. I think the Court has reference to——

The Court: What is the marking?

Mr. Koch: A-41, your Honor.

The Court: The Court declines to receive that in the record for marking. The Court strikes it from the record and returns it to counsel who produced it, because it violates the local rules of this Court relating to black background photostats.

Mr. Koch: In accordance with the Court's direction, I have had substituted pages photostatted under the supervision of the clerk of this Court, and

I request the Court's leave to substitute the black on white.

The Court: Let what you propose to be an exhibit in this case be brought forward and marked by the clerk, and it will be given the same mark, A-41, and we will see if it offends the rule. If it does, the Court will strike it and return it to counsel. This should have been disposed of long ago. That will now be marked Defendant's Exhibit A-41. [1022]

Mr. Riley: If the Court please, both these documents purport to be some type of military order.

The Court: He may offer proof as to their identification, unless you admit something that he thinks is sufficient. Let him make a statement to the Court that is thought to dispose of the matter.

Mr. Koch: Your Honor, under the Federal Rules of Civil Procedure, authenticated documents from Government agencies, of which the United States Army is one, are properly received in evidence, and——

The Court: I have nothing that is a certificate from any agency before me, and I decline to accept for consideration anything that is not marked for identification or used as such.

Mr. Koch: May I detach that certificate?

The Court: No, because in that case it would be defiling the thing certified.

Mr. Koch: The Court directed that the photographer be brought to take a photostat of the attachments, which has been done, your Honor.

The Court: The Court refuses to recognize, in

the first place, a certified copy, each and every part of it. It has not been accepted for marking for identification in this Court. You cannot properly detach from a file the thing which is treated by the defendant as certified, some [1023] part of it, and remains a certified copy.

Mr. Koch: We have re-duplicated exactly the parts the Army has certified.

The Court: I am sorry, but the Court declines to receive it.

Mr. Koch: In that event, your Honor, I would like to make an offer of proof with respect to it.

The Court: You may.

Mr. Koch: I wish to state that the offered exhibit received from the Army, from which the Court directed the clerk to strike the marking identification, was received directly by this Court from the United States Army under the seal of the Judge Advocate General of the United States Army, in accordance with Rule 1738, Title 28, USCA, under which Government exhibits, including Army authenticated documents, shall be received in evidence. The Federal Rules of Civil Procedure do not prevent the reception of such evidence even though the attachments may be photostats, white on black. To comply with the Court's direction, we have provided enlarged photostats of those attachments, black on white. We have requested the Court to attach the enlarged copies to the Judge Advocate General's certification and receive it in evidence.

In the case of Maynard, one of the plaintiffs in this action, that special order is already in evidence,

having [1024] been received through his own identification when he was on the witness stand.

In the case of Sgt. Waldrep, the certified copy which the Court has declined to receive in evidence would show conclusively that this soldier was proceeding on United States Air Force military orders, and directed to proceed from Korea, or Japan, I believe, to the Zone of Interior by military aircraft.

The Court: There is no photostat or other copy of any kind on white background, in particular. There is not of the certificate itself, attached to what is now marked Defendant's Exhibit A-41, contrary to the defendant's statement of what he will prove or does offer to prove in this case.

Mr. Koch: Your Honor, it would be only possible from what the Court has said to provide a photostatic copy of the certificate.

The Court: You have not done that, and you do not now have it done.

Mr. Koch: I didn't understand that the Court requested that.

The Court: The Court made no request of you to do anything.

Mr. Koch: If the Court will receive a photostatic copy of the certification from the Judge Advocate General, [1025] I will have it prepared and delivered to the Court this forenoon.

The Court: The Court is not making any request. I am reminding you what you do not have, contrary to your offer of proof.

Mr. Koch: The Court declined to release the

document to counsel for the purpose of making the copy.

The Court: If that document is in the Court's possession through the clerk's office counsel have the same opportunity to go in there with a camera and make the copy that all other counsel have in all other situations, of which fact the Court has previously advised counsel.

Is there any objection to the offer of proof?

Mr. Riley: There is, your Honor. If the Court please, plaintiffs' object to the offer of proof for the reason that both of these proffered documents are not related on the face of them in any way to the flight of defendant's, 324, January 18 - 19, 1952. There is no evidence on the face of them, either by the certificate which is itself inadmissible, or by any other evidence before the Court, that these documents were ever received by either of the plaintiffs, Maynard or the decedent Waldrep. There is no showing, and it could have been provided by the defendant, that these orders were ever superseded or cancelled or were in effect on the date of [1026] the death of Sgt. Waldrep, on the date of the injury of the plaintiff Maynard.

The Court: I understood from counsel's offer of proof that he would prove, among other things, that this Defendant's Exhibit A-41, so far as its present form and content is concerned, is the very same material which is already in evidence in the evidence received here during this trial in the Maynard case.

Mr. Riley: I believe he refers to Mr. Maynard's

service record, your Honor, and I don't know whether it is in the service record or not.

The Court: Will you look and see? If it is already in the record, that would seem to be another reason for lack of necessity of putting it in again, because the two cases are being tried together, and the evidence in one which is pertinent to the issues in the other is evidence in both, according to the effects of the consolidation order.

Mr. Koch: Your Honor, Exhibit A-16 is the special order covering travel by Mr. Maynard, and he admitted in the testimony that this was the special order on which he traveled.

The Court: I am trying to get counsel's minds at one upon this issue which is raised by your statement that this thing, less the certificate, is identical with [1027] something that is already in evidence in this case, at this trial.

Mr. Koch: It is with respect to Maynard, but it isn't with——

The Court: If it is in the case with respect to Maynard, it is in with respect to all other litigants in this case.

Mr. Koch: Except that this exhibit A-16 refers only to Maynard, and there was a separate order issued by this military base with respect to Sgt. Waldrep.

Mr. Riley: The document which purports to relate to the decedent is issued, as he said, by an entirely different military agency.

The Court: I do not understand that it is one and the same material. As I understand it, all he

meant to say last is that a similar statement as to one of the parties only is in evidence. That party is not the decedent in the Gorter case, which is the party as to whose situation exclusively this Defendant's Exhibit A-41 for identification relates, as I understand it now. Is there any objection to the offer?

Mr. Riley: Yes, your Honor, because there is nothing in it.

The Court: The objection is sustained, and I advise counsel if before the close of the case or if within a [1028] time that may be limited by the Court, if the Court does limit any time, if before the defendant's case in chief as to this matter is closed the defendant offers to this Court for further consideration a certified copy of the entire parts of the material certified by this governmental departmental certifier authorized by law to make such certification, the Court will consider it again. I do not see how any lawyer could possibly delay this matter until this stage of this trial and then force a situation which would involve the Court's extending the time for a matter like this against the effect of the closing of the defendant's case in chief. You may proceed.

Mr. Koch: Your Honor, may the refused exhibit, including the certification, be returned to counsel?

The Court: Is there any objection to that, to accommodate counsel in getting the certificate on it?

Mr. Riley: Yes, your Honor. With the distinct disadvantage to the plaintiff Gorter, I don't think

it should be removed from the possession of the clerk at this time.

The Court: I believe we can all identify it. Let plaintiffs' counsel look at it. You see the time you are consuming in this type of thing. Counsel on both sides are responsible. Will you look at the material, the substance of what has been marked Defendant's Exhibit A-41, and see if it is the same substance as the other material [1029] in the matter, so that you can identify it later.

Mr. Riley: Yes, your Honor.

The Court: The Court does grant the request to withdraw from this file the defendant's A-41 for identification with a view to seeing if he can still, after all these days since the beginning of this trial, get this in further shape. You may proceed.

Have counsel on each side finished the interrogation of Captain Leonard, who was on the stand yesterday?

Mr. Riley: I had completed my cross examination, your Honor.

The Court: Have you finished?

Mr. Koch: Yes, your Honor. May he be excused?

Mr. Riley: If the Court please, I don't know that we will need him on rebuttal or not at this time. I would like to have him remain, since we are very near the close of the trial.

The Court: The Court asks Captain Leonard to await the further direction of the Court. [1030]

JOHN IRVINE BIRD

called as a witness by defendant, was sworn and testified as follows:

Direct Examination

By Mr. Koch:

The Court: Will this witness state his name?

The Witness: John Irvine Bird.

Q. What is your address?

A. 206 West 35th Avenue, Vancouver, British Columbia.

Q. What business or profession are you engaged in

A. I am a lawyer.

Q. Will you trace your educational background?

The Court: Where are you licensed, if you are, to practice law?

The Witness: Throughout Canada, My Lord.

The Court: Are you a member of the bar, which we call a member of the bar of the legal profession, authorized to practice that profession at Vancouver, British Columbia?

The Witness: I am, Your Honor.

Q. Will you trace your educational background, Mr. Bird?

A. I received my university education at the University of British Columbia and graduated from there with a Bachelor of Commerce degree in 1938. I took one year of post-graduate work in constitutional law. During the same year, [1031] I studied for and passed the bar examinations for the first year set by the Law Society of British Columbia.

(Testimony of John Irvine Bird.)

During the next year, I went to Halifax, Nova Scotia, where I attended Dalhousie University, passed the first year examinations there. That was the Law School, and then since that was in early 1940, I was in the Naval Service, left there in late 1945, and returned to British Columbia, where I passed such additional examinations as were necessary to enable me to be admitted as a solicitor and called as a barrister in British Columbia, and commenced practice.

The Court: What type of work generally in the law have you done since you began your practice at Vancouver?

The Witness: I have specialized in admiralty and shipping matters, Your Honor.

The Court: Does the attorney for the plaintiffs question this witness' qualifications to testify as a lawyer, as an expert on British Columbia laws or Canadian laws?

Mr. Riley: We do not, Your Honor.

The Court: If agreeable to counsel, can you pass this matter relating to the preliminaries?

Mr. Koch: I wish to cover one or two questions only relating to his background.

The Court: You may do so. [1032]

Q. Have you had any teaching experience?

A. Yes, sir. When the Law School was established at the University of British Columbia, I lectured for the first four years, I think it was, on admiralty and shipping matters.

(Testimony of John Irvine Bird.)

Q. What is your present association?

A. I am a partner in the firm of Campney, Owen, Murphy & Owen.

Q. Are you familiar with the Families' Compensation Act of British Columbia?

A. I am.

(Families' Compensation Act marked Defendant's Exhibit A-42 for identification.)

Q. Is that a copy of the Families' Compensation Act? A. Yes, it appears to be.

Q. What is the nature of the Families' Compensation Act of British Columbia?

A. Well, this statute is passed on what we know in Canada as Lord Campbell's Act, which was a British statute. This act was passed for the purpose of giving to the representatives or the executor, administrator, of a deceased's estate a right of action against anyone who caused the death of the deceased in a wrongful manner, and it was necessary because at common law no such action existed.

Q. What is the British Columbia Supreme Court, if you know?

A. The British Columbia Supreme Court is a court of original [1033] jurisdiction in British Columbia having cognizance of all pleas whatsoever and jurisdiction in civil and criminal matters arising within the province.

Q. Do you know whether or not its jurisdiction would include a wrongful death action brought under the Families' Compensation Act?

(Testimony of John Irvine Bird.)

A. It would.

The Court: Have you ever compared this act which you named Families' Compensation Act with the general wrongful death act form in the American states?

The Witness: I have not, Your Honor.

Q. Did you hear the testimony of Mr. Leonard with respect to the location of the airplane after the impact and the location of the airplane after the attempt had been made to tow the plane, and the location of the plane on June 9, 1952, when Mr. Leonard re-examined the plane? A. Yes, sir.

Q. Based on such testimony, where did the accident happen?

Mr. Riley: I object to that.

The Court: The objection is sustained. You might ask him where Sandspit is, if he knows where it is.

Q. Do you know where the Queen Charlotte Islands are?

A. Yes, sir, I have been there.

Q. Are the Queen Charlotte Islands——

The Court: Ask him where they are. [1034]

Q. Where are the Queen Charlotte Islands?

A. The Queen Charlotte Islands are a group of islands located off the coast of British Columbia, about sixty miles west of the mainland.

The Court: What mainland?

The Witness: Of the Province of British Columbia.

Q. And where is Moresby Island, if you know?

(Testimony of John Irvine Bird.)

A. Moresby Island, I believe, is the southernmost of that group.

Q. And are you familiar with a point known as Sandspit? A. Yes, sir.

Q. Where is that?

A. That is at the end of Skidegate Inlet.

The Court: In what nation, what province, county city or place is that place Sandspit, if you know?

The Witness: It is in the County of Prince Rupert, in the Province of British Columbia.

The Court: In what nation?

The Witness: Canada.

The Court: The Dominion of Canada?

The Witness: Yes, sir.

Q. In your opinion, based on Mr. Leonard's testimony, did the accident happen in British Columbia?

Mr. Riley: Objection.

The Court: The objection is sustained.

Q. What court in British Columbia, if you know, would have [1035] had jurisdiction of the subject matter of this airplane accident?

A. The Supreme Court of British Columbia.

Q. Assuming the jurisdiction on the part of the court of the defendant, would the British Columbia Supreme Court have jurisdiction to hear and decide litigation arising out of this accident?

Mr. Riley: Objection.

The Court: The objection is overruled. He doesn't

(Testimony of John Irvine Bird.)

say "exclusive". A. It would.

Q. Would that jurisdiction be exclusive?

The Court: The objection is sustained. Do you make objection to that?

Mr. Riley: Yes, I do, Your Honor.

The Court: The objection is sustained.

Q. What have you to say with respect to the exclusive aspects of such jurisdiction?

Mr. Riley: If the Court please, I want to object.

The Court: The objection is sustained.

Mr. Riley: I would like to elucidate and—well——

Mr. Koch: May I ask the basis?

Mr. Riley: Counsel intends to and is about to go outside the scope of his pleadings and his amended pleadings which were permitted shortly before the original [1036] trial date after the pre-trial hearings in this action. He alleged—and I refer the Court to his amendment, paragraph IX of the defendant's answer, lines 17-21, where he states: "The defendant alleges that the applicable statute on which the plaintiffs' claim should have been based is Chapter 116, British Columbia Revised Statutes 118, entitled 'Families' Compensation Act.' "

Mr. Koch: Your Honor, I am completely within my pleadings. I am trying to ask the question that does not include another jurisdiction. I am asking whether or not this jurisdiction is exclusive, and if the answer is that it is exclusive, I am exactly within my pleadings.

(Testimony of John Irvine Bird.)

The Court: The objection is sustained.

Q. If the British Columbia court had before it a wrongful death action stemming from the accident, what law would the court apply?

Mr. Riley: I want to object. The question is outside the scope of the pleadings. I believe he can ask "Could it have applied." He cannot ask him whether it would have.

The Court: The objection is sustained.

Q. If the British Columbia court had before it a wrongful death action stemming from the accident, what law could the court have applied?

A. It could have applied the Families' Compensation Act.

The Court: Of the—— [1037]

The Witness: Province of British Columbia.

Q. Assuming that on January 19, 1952, at about 1:40 A.M., an airplane attempted a takeoff from the Sandspit, British Columbia, airport, made a left bank after leaving the end of the runway and ditched in the waters of Hecate Strait from one-half to three-quarters of a mile from shore; and bearing in mind Mr. Leonard's testimony; and assuming further that a wrongful death action in the British Columbia Supreme Court was brought by an administratrix of the estate of a passenger who died in the accident as a result of drowning or exposure; and assuming further that the British Columbia Supreme Court had jurisdiction of the defendant, would the British Columbia Families' Compensation Act be applicable?

(Testimony of John Irvine Bird.)

Mr. Riley: If the Court please, I believe, first, the hypothetical question calls for a conclusion of the witness based on the testimony of Mr. Leonard. Secondly, the question asks if the court would apply the hypothetical question, not could it apply the Families' Compensation Act, and it should delete any reference to Mr. Leonard's testimony.

The Court: That part of the objection is sustained. You may use the word "could."

Mr. Koch: I said, "Would it be applicable."

The Court: With that interpretation on the question, [1038] the objection is overruled, and the witness may answer the question. It is merely the last concluding words that should be referred to as the form of the question that is to be finally submitted. Do you understand it?

The Witness: I believe so, your Honor. It would be applicable.

Q. Will you read Section V of the Families' Compensation Act?

The Court: It has not been offered.

Mr. Koch: Excuse me. I do offer it, your Honor, at this time.

Mr. Riley: The pleadings make reference only to Sections III and V of the Families' Compensation Act. We object to the admissibility of this document as to anything other than Sections III and V of the Families' Compensation Act.

Mr. Koch: That is not my interpretation.

The Court: May I see the pleadings?

Mr. Koch: Yes, your Honor.

(Testimony of John Irvine Bird.)

The Court: Let counsel have the file and let him point out the pleadings. After defendant's counsel has pointed it out, I wish the opportunity to be given to plaintiffs' counsel to point it out.

Mr. Riley: We have it, your Honor.

The Court: Will you show that to opposing counsel, Mr. Riley? What have you called to the attention of Mr. [1039] Koch to illustrate your objection?

Mr. Riley: I have shown Mr. Koch a document entitled "Amendment of Paragraph IX of Defendant's Answer," which was further amended at the time by interlineation by Mr. Koch, at the time of the argument on the motion for permission to amend which was made after the entry of the pre-trial order and before trial.

The Court: Will you read the words and figures used in the pleadings to identify the sections which are pleaded, Mr. Koch?

Mr. Koch: This is entitled Paragraphs IX and XII, affirmative defense, and the pertinent portion reads as follows:

"Defendant specifically denies the applicability of Section 4.20.010 of the Revised Code of Washington and alleges that the applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statutes, 1948, entitled, 'Families' Compensation Act,' Sections 3 and 5, which provide as follows;—"

The Court: That is sufficient. Are there any other sections referred to?

(Testimony of John Irvine Bird.)

Mr. Koch: No, not as such. The whole Act is referred to, and the two sections are quoted.

The Court: Let me see the pleading. The objection [1040] is sustained.

Mr. Koch: I think that at the time of the objection, I had asked that the exhibit be admitted in evidence.

The Court: And you objected to admitting it in evidence because it contains more than 3 and 5?

Mr. Riley: Yes, your Honor.

The Court: The objection is overruled. Defendant's Exhibit A-42 is limited in all respects to Sections 3 and 5 thereof quoted in this last pleading mentioned by counsel, and no other part of the Act is admitted, merely Sections 3 and 5 of the Act.

Mr. Koch: Does the Court rule that the pleading does not embrace the entire Act?

The Court: I do not. I sustain the objection that the only sections pleaded and relied upon are those two, and it is only as to those two sections that the Court receives this Defendant's Exhibit A-42. As to all other parts of it, the Court will wholly disregard Defendant's Exhibit A-42, but will give full consideration to that part of it which relates to and sets forth Sections 3 and 5.

(Defendant's Exhibit A-42 for identification received in evidence.)

Q. Mr. Bird, will you read Sections 3 and 5, please?

A. Section 3 of the Families' Compensation

(Testimony of John Irvine Bird.)

Act, Province of [1041] British Columbia, reads as follows: "Whenever the death of a person shall be caused by wrongful act, neglect, or default and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, and notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offense."

Q. Will you read Section 5, please?

A. "Section 5. Not more than one action shall lie for and in respect of the same subject-matter of complaint; and every such action shall be commenced within twelve calendar months after the death of such deceased person."

Q. Is Section 5 substantive or procedural?

Mr. Riley: I will object to that, the reason being that counsel has not alleged in his allegations and in his pleadings the whole law and what the effect of the law is and the construction of the law. He has only alleged simply that we could have commenced an action under this Act, and he has not pleaded the entire law, and he is required to do so.

The Court: Will you read the pleading setting out the [1042] words by which your pleadings' reference to this statute of British Columbia was set out?

(Testimony of John Irvine Bird.)

Mr. Koch: "Defendant does not have sufficient information to form a belief as to the truth or falsity of the allegations set forth in the first two lines of Paragraph IX"—that is referring to plaintiffs' complaint—"and therefore denies the same. Defendant specifically denies that the alleged beneficiary for whose benefit plaintiff is alleged to have instituted this suit has been damaged in the amount of Fifty Thousand Dollars or in any other amount by reason of the facts alleged herein. Defendant specifically denies the applicability of Section 4.20.010 of the Revised Code of Washington and alleges that the applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statutes, 1948, entitled, 'Families' Compensation Act,' Sections 3 and 5, which provide as follows; and which requires dismissal of plaintiff's complaint for failure to state a cause of action. That said statute's limitation provisions bar this action." Then Sections 3 and 5 are quoted.

The Court: The issue here is what?

Mr. Riley: The issue is, your Honor, that the allegation states a mere legal conclusion. There is no allegation that the limitation provision contained in [1043] Section 5 of the British Columbia Families' Compensation Act is procedural as against substantive. As the Court knows, if it were procedural——

The Court: The objection is overruled. Your question is directed, is it not, to the state of the British Columbia law on that question?

(Testimony of John Irvine Bird.)

Mr. Koch: Yes, your Honor.

The Court: The objection is overruled, but suspend the answer until after the recess. The Court is now at recess for ten minutes.

(The court was at recess for ten minutes.)

The Court: You may proceed.

Mr. Koch: Will the reporter read the last question?

(Last question read by reporter as follows:

Q. Is Section 5 substantive or procedural?)

Mr. Riley: The objection is repeated, if the Court please, as to that question.

The Court: The objection is overruled. I understand that the question and the answer relate to the state of British Columbia law as understood among British Columbia lawyers, of which this witness is one. That is my understanding of what was intended by the question.

Mr. Koch: That is my understanding of the question, your Honor.

A. Yes, it is substantive, because—— [1044]

Mr. Riley: Objection.

The Court: You needn't give the "because" yet.

Q. Will you please explain your answer?

Mr. Riley: I would like to object.

The Court: The objection is overruled.

A. The reason is that this statute gave a right of action which did not exist at common law, and, in consequence, it is part of the substantive law of British Columbia.

(Testimony of John Irvine Bird.)

Q. Mr. Bird, what is the British North American Act?

The Court: If you know.

Mr. Riley: Objection. There is no——

The Court: The objection is sustained until the question is properly conditioned.

Q. If you know, will you state what the British North American Act is?

Mr. Riley: If the Court please, as to that question I would like to state that there is no reference to any other statutes within the scope of these pleadings, and the question is irrelevant. It is completely outside the scope of defendant's allegations as to the applicable law or what law could have been applied.

The Court: Do you specifically contend or do you not further contend specifically that since it is not pleaded, it is not the proper subject of proof, being a foreign law?

Mr. Riley: Yes, your Honor. [1045]

Mr. Koch: Your Honor, the purpose of the question is to develop through this witness a division of law-making and legislative power between the Dominion and the Province, and through that the derivation of authority to apply the Families' Compensation Act by the Province will be explained, and this is fundamental.

The Court: You can ask this witness' opinion as to whether or not, if this Act which has been received in evidence as to Sections 3 and 5 was passed or enacted by a legislative body, whether or

(Testimony of John Irvine Bird.)

not such body had had such legislative powers, and it is not necessary to go into all this long detail about what all the Canadian law provides.

Q. What Government, if you know, has the exclusive authority to deal with regard to property and civil rights?

Mr. Riley: I don't like the terminology "exclusive," and I am afraid what counsel is leading to, he wants something in the record that deals with the exclusive nature of this.

The Court: The Court sustains that objection. State, if you know, Mr. Bird, does the legislative authority enacting Defendant's Exhibit A-42 have the legislative authority to pass and enact such an act?

The Witness: It has, your Honor.

The Court: Did it have such authority when that [1046] exhibit was enacted into law?

The Witness: It did, your Honor.

Q. What have you to say as to whether the Families' Compensation Act deals with matters affecting property and civil rights?

Mr. Riley: I object, your Honor. It is calling for a conclusion and it is a leading question.

The Court: In addition to what has already been disclosed as to the issues, what is it now that has not been covered by the proof already as to this wrongful death act of Canada?

Mr. Koch: What has not been covered is the fact that so far as the Canadian law-making power is concerned, only the legislature of British Co-

(Testimony of John Irvine Bird.)

lumbia could enact and deal in this field of property and civil rights, that no other legislature or other courts in a different jurisdiction of Canada would have any function in that respect.

The Court: Is that admitted, so far as his dealing with the subject is concerned?

Mr. Riley: No, your Honor. It is entirely outside the scope of defendant's pleadings in this matter. Counsel is attempting by any route he can, a devious route, to prove, if he can, he is trying to assert this is some kind of an exclusive remedy, which he has not alleged and which he cannot prove. [1047]

The Court: Where is the allegation?

Mr. Koch: We have alleged it, your Honor. We have alleged that the applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statutes, 1948, entitled "Families' Compensation Act," Sections 3 and 5, which provide as follows, and which require dismissal of plaintiff's complaint for failure to state a cause of action, that said statute's limitation provisions bar this action.

The Court: The objection is sustained. The Court treats this proof as tending to establish, and if I hear no other proof on the subject, it will establish the fact as alleged that if the Canadian law is thought by this Court to govern this action, that it is all stated in these Sections 3 and 5 here in question.

(Testimony of John Irvine Bird.)

Mr. Koch: I have a question that may invade the Court's ruling.

The Court: I will hear it.

Q. Could the wrongful death action now before this Court be properly entertained by the Admiralty Court in British Columbia?

Mr. Riley: I object to the question. It is leading.

The Court: What is there in the pleadings that makes that material?

Mr. Koch: The fact that he said it is the Families' [1048] Compensation Act that applies, and I wish to negate the possible interpretation that some other court could have entertained this action, too.

Mr. Riley: And also implicit in the question, that there are other laws in Canada. He made specific reference to admiralty law, which is not pleaded.

The Court: The objection is overruled.

A. No, the Admiralty Court in British Columbia would not have jurisdiction, in the circumstances.

The Court: Would it have jurisdiction to apply to admiralty jurisdictional facts regularly brought before the British Columbia admiralty courts of these Sections 3 and 5 causes of action under this Families' Compensation Act of British Columbia?

The Witness: If I understand your Lordship—

The Court: Would the Admiralty Court be able to apply the rights given to persons and litigants under Sections 3 and 5 of the Families' Compensation Act?

(Testimony of John Irvine Bird.)

The Witness: Yes, your Honor. In a quite recent case, the judge of the admiralty district in British Columbia stated, if my recollection is correct, that his court, sitting in admiralty, could apply the provisions of the Families' Compensation Act.

The Court: Is that what you sought?

Mr. Koch: Yes, your Honor. One further aspect of it. [1049]

Q. To what extent, if any, does the admiralty jurisdiction extend to airplane accidents?

A. The admiralty court has jurisdiction in respect of salvage of airplane accidents, of the aircraft, rather. It does not have jurisdiction over wrongful death actions resulting from an aircraft crash or accident unless the aircraft collided with a vessel or was damaged as a result of the negligent navigation of a vessel.

The Court: That last statement the Court does not understand, in view of your prior one that if the litigation under Sections 3 and 5 of the Families' Compensation Act was properly submitted to the Admiralty Court, it could adjudicate those rights under that Act. I do not understand how your last statement can conform with what I understood you to say previously.

The Witness: Your Honor, if it had jurisdiction in the matter it could apply the Families' Compensation Act.

Q. With respect to the accident off Sandspit, you testified before the recess, as I recall, that

(Testimony of John Irvine Bird.)

Sandspit and Moresby Island are in British Columbia, did you not? A. That is correct.

Q. Do you know how far into the water ownership of land vests—how far out is still British Columbia?

The Court: If you know, how far out from shore.

A. The Province of British Columbia extends certainly to [1050] ordinary low water mark. Beyond that out to what is known as the three-mile limit, the Province and the Dominion have exercised—have legislation in respect of that area, but there has not been any definite judicial pronouncement as to the ownership of the land between ordinary low water mark and a point three miles seaward.

Mr. Koch: I have no further questions.

Mr. Riley: We have no questions, your Honor.

The Court: Is there anything further?

Mr. Koch: No, your Honor.

The Court: You may be excused from the stand, Mr. Bird.

Mr. Koch: We will call Mr. Kildall.

JOSEPH M. KILDALL

called as a witness by defendant, was sworn and testified as follows:

Direct Examination

By Mr. Koch:

The Court: State your name for the record, please.

(Testimony of Joseph M. Kildall.)

The Witness: Joseph M. Kildall.

The Court: What was your father's name?

The Witness: Harold.

The Court: Did he ever have anything to do with teaching navigation? [1051]

The Witness: Yes, sir.

The Court: Did you ever have anything to do with that subject?

The Witness: Yes, sir.

Mr. Koch: Your Honor, before interrogating this witness, I would like to offer the exhibit that was previously offered.

The Court: Have you seen it?

Mr. Riley: Yes, your Honor, I have seen it.

The Court: Do you wish, Mr. Koch, to have what you have handed the clerk put together and marked what was marked Defendant's Exhibit A-41, and to be used as a substitute for what was previously so marked and previously withdrawn and delivered to counsel?

Mr. Koch: Yes, your Honor.

The Court: Is what is now marked A-41 an exact reproduction by photostat process of what was previously marked A-41?

Mr. Riley: It is, your Honor.

The Court: The Court has rearranged the exhibit. Let both of them be shown to each counsel and let them see what form the exhibit now has.

Mr. Koch: I now offer Defendant's A-41 in evidence.

Mr. Riley: Your Honor, I must object as to the

(Testimony of Joseph M. Kildall.)

decedent Waldrep. This document has not been [1052] shown by any testimony of anyone ever to have been received by him before his death, or, if so, when it was in effect. There is nothing before the Court or in the record in testimony, and I don't know that this was ever received by the decedent or how it affects him in any manner. I think it is entirely irrelevant so far as the issues before this court.

The Court: Do you dispute that the decedent Waldrep's service number was RA 14 315 210?

Mr. Riley: I have 14 315 210 as his service number.

The Court: This is a certificate relating to the service record of that person, a true photostatic copy of Letter Orders 142, Headquarters 6403d Personnel Processing Squadron, etc. Do you deny that these papers so certified are material to any issue in this action?

Mr. Riley: Yes, your Honor, I do deny that they are material.

The Court: On what issues do you offer these various parts of what is now marked Defendant's Exhibit A-41 for identification?

Mr. Koch: Both attachments, your Honor, recite that the servicemen involved are proceeding to the Zone of Interior, the United States, by military aircraft. One of the causes of action alleged by the plaintiffs is the applicability of the Warsaw [1053] Convention, an international treaty providing for air carriage and rights and liabilities with

(Testimony of Joseph M. Kildall.)

respect to persons subject to that act. In the adherence of the United States of America to the Warsaw Convention, an exception was made with respect to transportation of the United States Government. This is such transportation, and it bears directly on the issues of the second cause of action in the Gorter case.

Mr. Riley: If that is what it is offered to prove, I believe the documents are entirely hearsay.

The Court: The objection is overruled. Defendant's Exhibit A-41 is now admitted.

(Defendant's Exhibit A-41 for identification received in evidence.)

The Court: The Court has heard this witness testify before, and the Court from that experience knows something about this man's navigational activities.

Mr. Koch: If the Court accepts this witness as an expert witness——

The Court: I do not know what he is called for. He may be called for some other unrelated matter. You may ask him his name and occupation and what he has done recently in regard to the occupation.

Q. Will you state your name, please?

A. Joseph M. Kildall.

Q. And your address? [1054]

A. 909 Fourth Avenue, YMCA Building.

Q. What is your present occupation?

A. I am a navigation instructor, chief navigation instructor.

(Testimony of Joseph M. Kildall.)

Q. How long have you been in the field of navigation work?

A. I have been teaching navigation for fifteen years, slightly over fifteen years.

The Court: Where have you been teaching?

The Witness: YMCA Navigation School.

The Court: How many hours a day?

The Witness: Seven and a half hours for each working day, half a day on Saturday.

The Court: How many years have you been doing that?

The Witness: Slightly over fifteen years.

The Court: What aspects of navigation do you teach?

The Witness: We mainly prepare men for merchant marine examinations as licensed deck officers. We also teach men for fishing, yachting, and various navigational work.

The Court: Do you wish to make any inquiry as to whether opposing counsel has any objection to his qualifications to speak as an expert on navigation matters?

Mr. Koch: Yes, I would like to make that inquiry.

Mr. Riley: No, I do not, as to anything in the United States.

Q. What has been your experience apart from teaching? [1055]

A. I started going to sea about 1932, and got a license as third mate in 1937, and sailed——

The Court: As quickly as feasible with the de-

(Testimony of Joseph M. Kildall.)

fendant's case in chief, inquire of his experience in navigation in and about the waters near the place where this accident occurred.

Q. What is your present rating in the maritime?

A. I hold a license as master of ocean steam and motor vessels, any gross tons.

Q. Have your activities taken you to the waters in the neighborhood of British Columbia?

A. Yes.

Q. The Queen Charlotte Islands and that general area?

A. Yes, sir, I have been through there several times.

Q. Are you familiar with seacoasts in the vicinity of Sandspit, Skidegate, and those related beaches?

A. I have been by this area.

Q. Are you familiar with charts and with the calculations necessary to ascertain heights of tides?

A. Yes, sir, I am.

Q. Have you been able to calculate the tide on January 19, 1952, at approximately 1:40 A.M.?

A. Yes, sir, I have.

Q. At Sandspit, British Columbia?

A. Yes, sir. [1056]

Q. What was the height of the tide at that time?

A. The height of the tide on January 19, 1952, for Shingle Bay, which is adjacent to——

Mr. Riley: I object, counsel. The witness is referring to what is written on printed matter before him.

(Testimony of Joseph M. Kildall.)

The Court: Will you lay aside the written matter?

Mr. Koch: May he refer to computations?

The Court: I see no reason for it.

Q. Have you made computations with respect to the height of the tide at this particular hour and date? A. Yes, sir, I have.

Q. With reference to the computations which you have made, if that is necessary, what was the height of the tide at this time in question?

A. It was 10.672 feet at 1:40 A.M.

The Court: That was the height of the tide?

The Witness: Yes, sir.

Q. Was it rising or falling?

A. The tide was rising at the time.

Q. At what rate, if you know?

A. The rate would only be an approximation, two feet per hour.

Q. Did you determine the height on June 9, 1952, of the tide at the lowest tide on that day?

A. Yes, sir. The lowest tide on June 9, 1952, had a height of .936 feet. [1057]

The Court: What time was it?

The Witness: I would have to check. It was——

Mr. Koch: May he refer to his notes for the hour?

The Court: When did you make your notes?

The Witness: I worked this out yesterday, sir.

The Court: And that is the first time you made the note as to the time?

The Witness: Yes, sir.

(Testimony of Joseph M. Kildall.)

Mr. Riley: I object, your Honor.

The Court: The objection is sustained.

Q. At approximately what time of day was this?

A. Approximately 8:27 in the morning.

The Court: Was the high tide reading about which you first testified on the same day, June 9, 1952?

The Witness: No, sir. That was on January 19, 1952.

Q. When you refer to low tide, what does that mean?

A. In each day, there are approximately four tides, two of those tides being high tides or high water, and two being low water. As to low water, that would be one of the two lowest tides of that day.

Q. When you say it is .936 feet, what does that number refer to? What would zero be?

A. Zero would be in this particular case .936 feet below the height of the tide at the lowest water.

Q. How do they get the zero measurement, the [1058] reading point of the scale?

A. The zero is determined by observation over a period of nineteen years, and an average point is arrived at to determine the zero point.

Q. An average of what?

A. The average of the low waters is arrived at.

Q. Does that mean, if I understand you correctly, that in terms of this average low water, .936 was .936 of a foot above the ordinary low water?

(Testimony of Joseph M. Kildall.)

Is that what you are pointing out, or do you mean something else?

Mr. Riley: I don't like to object, because I would like to see this case finished before Monday, but counsel should not lead the witness.

The Court: Avoid leading.

Mr. Koch: I will rephrase it, your Honor.

Q. In terms of this average that is determined over a nineteen year period, explain the measurement of .936 feet of June 9, 1952, at low tide.

A. .936 would indicate a plus tide above the zero point used for the measurement of the tide and also the soundings of that area.

Q. What would be the term that zero relates to? Is there a term that describes zero?

A. Zero would be normal low water.

Q. Did you consult the charts and make [1059] calculations with reference to the tides in the year 1952?

A. Yes, sir. I checked a few other tides during that year.

Q. Were there other tides higher or lower than .936 feet? A. Yes, sir.

Mr. Riley: If the Court please, this whole line of questioning deals with reference to documents not now before the Court, hearsay matters, which this witness has admitted he examined yesterday and he apparently does not have with him now, except for his own notes he prepared for his testimony. I object to the entire line of questioning

(Testimony of Joseph M. Kildall.)

and proceeding any further along this line, for that reason.

The Court: The objection is overruled. I wish you to be as brief as is humanly possible.

Mr. Koch: Would the reporter read the last question?

(Last question read by reporter.)

A. Yes, sir, there were other tides during the year.

Q. That was in 1952? Your answer, again?

A. There were other tides that were higher and lower during that year.

Q. A number of them?

A. Yes, sir, quite a number of tides.

Q. What sources of information has your testimony required you to refer to?

A. I have had to refer to the Canadian tide [1060] tables for the year 1952, published by the Canadian Hydrographic Office, and also the tide tables of the——

The Court: So far as his answer depends upon his looking at any Canadian tide tables, as to the objection previously made to the effect that he is reporting information found on records which are not now in evidence and hearsay, the Court's previous ruling is modified so that as to the information having a source in those records, it is sustained and the Court will disregard it.

Mr. Koch: Your Honor, I think perhaps I made it unclear. This witness made the calculations himself, but he had reference data, which is a normal

(Testimony of Joseph M. Kildall.)

thing. I am only asking him to say what the reference data was.

The Court: The objection is sustained on anything that he has answered that depends for its accuracy on his reference to foreign government documents of the kind mentioned. They should be brought here, if you wish them.

Q. Do you have the documents before you?

A. Yes, I have.

The Court: At this time, we will be at recess until 1:30.

(Recess.)

The Court: The witness has returned to the stand for further interrogation. I ask you to expedite the examination. [1061]

(Tide Tables of Pacific Coast of Canada marked Defendant's Exhibit A-44 for identification.)

(Tide Tables of West Coast marked Defendant's Exhibit A-43 for identification.)

Q. Directing your attention to what has been marked Exhibit A-44, will you state what that is?

The Court: If you know.

A. This is the tide tables of the Pacific Coast of Canada, published by the Canadian Hydrographic Office.

Q. Did you use that exhibit in calculating the measurements of the tide, and also your own personal knowledge with respect to which you testified this morning? A. I did, sir.

Mr. Koch: I will offer that exhibit in evidence.

(Testimony of Joseph M. Kildall.)

The Court: State, if you know, who issued those tide tables.

The Witness: These were issued by the Canadian Hydrographic Service.

The Court: What kind of agency, if it is an agency, is that?

The Witness: It is of the Department of Mines. It is the Surveys and Mapping Branch.

The Court: Of what institution or organization?

The Witness: Department of Mines and Technical Surveys, Ottawa. [1062]

The Court: What nation or province or state or county or city or other kind of an organization of government, if it is any such kind of thing, is that issued by, if you know?

The Witness: Dominion Hydrographer, Canadian Hydrographic Surveys.

The Court: I would like for you to state what you know without reference to that document.

The Witness: All I know is what is given on the table, sir.

The Court: You don't know anything about it yourself differently from that?

The Witness: No, sir, I don't.

Mr. Riley: May I inquire, your Honor?

The Court: You may inquire.

Mr. Riley: Is this document certified or is there attached thereto any type of certificate by a consular officer of the United States or resident of Canada under the seal of his office?

(Testimony of Joseph M. Kildall.)

The Witness: There is a label, "Canada", with a seal of some sort at the top of the table on the front cover.

Mr. Riley: The seal to which the witness refers, of course, is a printed seal. I refer Court and counsel to 28 USCA 1741, which provides: "A copy of any foreign document of record or on file in a [1063] public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, that the copy has been certified by the lawful custodian."

Mr. Koch: That section counsel quotes is not in point, because that refers to documents on file in a government office. This, however, is a published book. It is my understanding that published documents that are available to the public and are publications of——

The Court: Try to give me some authority for it.

Mr. Koch: I will cite to the Court the case of *Cherry Point Fish Company vs. Nelson*, 25 Wash. 558, which held specifically that tide tables prepared by the United States Government for the use of navigators on the waters of Puget Sound are competent evidence for the purpose of——

The Court: Will you try to find some holding or statute that relates to foreign material?

Mr. Koch: I don't have a statute.

The Court: I wish to have it; otherwise, the

(Testimony of Joseph M. Kildall.)

Court reserves ruling and you will have to produce something before you rest your case in chief.

Q. Referring to what has been marked Exhibit [1064] A-43, will you state what that booklet is?

A. This is the tide tables for the West Coast of the United States, including the Hawaiian Islands.

Q. Does it include Canadian waters?

A. Yes, it does include Canadian waters, and the United States. It is actually North and South America.

Q. By whom is that document prepared?

A. It is prepared by the United States Coast and Geodetic Survey of the United States Department of Commerce.

Q. For what year is that tide table applicable?

A. This is for the year 1952.

Mr. Koch: I will offer that exhibit in evidence.

The Court: Any objection?

Mr. Riley: Yes, your Honor.

The Court: What is it? Let opposing counsel see Exhibit A-43.

Mr. Riley: Do you know whether or not Exhibit A-43 was authenticated by any official of the United States?

The Witness: No, sir, I don't.

Mr. Riley: If the Court please, the exhibit on the face of it shows that it is published by, prepared by the United States Department of Commerce Coast and Geodetic Survey for the year 1952. It does not bear an authentication, I believe.

(Testimony of Joseph M. Kildall.)

The Court: As required by what? [1065]

Mr. Riley: Section 1733 (b) of Title 28, which states: "Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof." I believe that the document on the face of it is inadmissible.

The Court: Have you anything to say?

Mr. Koch: Yes, your Honor. The statute counsel refers to——

The Court: I ask you to show me something on which the Court can rely.

Mr. Koch: The statute upon which counsel relies is a statute which refers only to properly authenticated copies or transcripts of books. It specifically states that such copies shall be admitted equally with the originals thereof. This is a Government publication. This is available, it is prepared by the Government. It is in the same category with the Warsaw Convention and the treaty series which counsel presented to the Court.

The Court: Will you look at the provisions of subsection (a) of Section 1733? "Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept." [1066]

Mr. Koch: And that also holds to the same effect I have cited.

(Testimony of Joseph M. Kildall.)

The Court: The objections to A-43 are overruled. Defendant's Exhibit A-43 for identification is now admitted. You may proceed.

(Defendant's Exhibit A-43 for identification received in evidence.)

Q. Mr. Kildall, did you make calculations based upon the American tide table which is Exhibit A-43? A. Yes, I did.

Q. Did you make computations as to the height of the tide on January 19, 1952, at approximately 1:40 A.M.? A. Yes, sir, I did.

Q. What was the height of the tide according to that table and your computations at that time?

A. The height of the tide was 12 feet.

Q. Was it rising or falling?

A. It was rising at this time.

Q. Can you state the rate of rise?

A. The rate of rise was approximately two feet per hour.

Q. With reference to the same table, did you make calculations on June 9, 1952, at low tide?

A. Yes, sir, I did.

Q. What was the low tide on the morning of June 9, 1952?

A. On June 9, 1952, the A.M. low water was 1.1 feet plus. [1067]

Q. Plus what?

A. Plus 1.1 feet. It was above the zero point. It was 1.1 feet.

Q. How does the zero point relate to the zero point on your prior testimony?

(Testimony of Joseph M. Kildall.)

A. It is one and the same point.

Q. That is the low water mark, is it?

A. For that area, the low water mark is fixed.

Q. Did you check the table and make calculations relative to tides, the height of low tide at other dates during the year?

A. I found that there were other tides lower during the year. There were tides in January, some in July, and some in August that were somewhat lower than that tide.

Q. Can you state whether or not the ordinary low tide would be the tide at a point where it reached zero, or neither a plus or minus reading?

A. The normal low tide, in most cases, would run very close to zero, because all calculations attempt to have all tides come out as positive figures for each area.

Q. Do you know whether or not that zero point is determined with the years of study of the low water, as you testified this morning, on the American table?

A. Yes, sir. The points are the same.

Mr. Koch: I have no further questions. [1068]

Mr. Riley: No questions, your Honor.

The Court: You may step down.

(The witness was excused.)

The Court: Call the next witness.

Mr. Koch: May this witness be excused?

Mr. Riley: No objection.

The Court: Captain Kildall is excused.

Mr. Koch: That is the end of the defendant's case, your Honor.

The Court: Does the defendant rest?

Mr. Koch: Yes, your Honor.

The Court: Is there any rebuttal?

Mr. Riley: Very briefly, your Honor. Call Mr. Cunningham.

Mr. Koch: Your Honor, the clerk points out that the Court reserved ruling with respect to the admissibility of the Canadian tide tables.

The Court: I said I would reserve ruling until counsel before the end of counsel's case in chief showed some authority for admitting it upon the proof offered, and if you haven't any——

Mr. Koch: The only authority I have is the case I cited to the Court which made a reference to the American tide table, but it did admit a tide table covering the area, your Honor. [1069]

The Court: The Court's ruling will stand. It is now made absolute, and the objection to Defendant's Exhibit A-44 for identification, after opening up the defendant's case in chief for the purpose of considering this exhibit further, is now sustained. The Court does now confirm permanently the Court's previous ruling that the objection be sustained, that it is now sustained, and the Court rejects the offer for admission of Defendant's Exhibit A-44 for identification.

Does the defendant now rest?

Mr. Koch: Yes, your Honor.

The Court: I understand it does. Let the record so show. [1070]

JOHN CUNNINGHAM

called as a witness in rebuttal by plaintiffs, was sworn and testified as follows:

Direct Examination

By Mr. Riley:

The Court: What is the witness' name?

The Witness: John Ritchie Cunningham.

The Court: This witness, called as a part of plaintiffs' rebuttal, may now be interrogated.

Q. Where do you reside?

A. In Vancouver, British Columbia.

Q. What is your occupation?

A. I am a barrister and solicitor.

Q. With what firm are you associated?

A. I am a partner in the firm of Macrae, McMurdo, Macrae, Hill and Cunningham.

Q. How long have you been associated with that firm as a partner?

A. With that firm and the predecessor firm for a period of approximately six years.

Q. Would you state your background as a solicitor and barrister, in what courts you have appeared and are admitted to practice before in Canada?

A. I have been admitted to practice in all the courts in Canada, and have appeared in all the courts in British Columbia and in the Supreme Court of Canada.

Q. Do you practice any specialty in the law?

A. I have a specialty in shipping and admiralty.

Q. Are you a member of any association committee of any particular specialties?

(Testimony of John Cunningham.)

A. I am chairman of the present Maritime Law Subsection of the Canadian Bar Association for British Columbia, and a member of the Air Law Subsection for British Columbia for the Canadian Bar Association.

Q. Would you trace for us your legal education and the period of time you have practiced since the completion of that education?

A. I took two years at the University of British Columbia before joining the Canadian Navy in 1942, and after the war completed a Bachelor of Laws degree at the University of British Columbia. I was called to the bar and admitted as a solicitor in July 1948, and have been practicing ever since.

Q. I will ask you to assume that in January 1952 a United States airplane operated by a United States corporation, Northwest Orient Airlines, Inc., pursuant to a contract with the United States Government, Department of the Air Force, left Japan with passengers for the United States, and [1072] after leaving Anchorage, Alaska, attempted to make an emergency landing at the airstrip at Sandspit, British Columbia, but instead crashed into open water at a point approximately one-half to three-quarters of a mile from shore; and ask you to assume further that one of the passengers, a United States citizen, died, leaving surviving a wife and an infant child; and assume further that the said death was caused by the wrongful act or acts of the carrier, Northwest Airlines, Inc.; and assume further that the administratrix of the deceased's

(Testimony of John Cunningham.)

allegations of the complaint; it has to stay within the limits of the evidence received in the case, whether the evidence tends to support the allegations of the complaint or not.

Mr. Koch: But it was admitted, your Honor, so that as far as the trial of this case was concerned, my understanding is that when an allegation is made in the complaint and admitted in the answer, it is no longer at issue in the case.

The Court: If it happens to be connected in any [1075] way with an affirmative defense not admitted, it may be received. The mere fact that the plaintiff does not in the plaintiff's complaint specifically allege the facts in accordance with the evidence received, if there has been evidence received in support of an affirmative defense, then rebuttal evidence of such affirmative defense, supporting evidence, may be received. It seems to me that it may be.

Mr. Koch: I recall only the testimony of Mr. Leonard, Mr. Sanders and Mr. Cox relating to the location of the plane as one-half mile from the shore adjacent to the Sandspit runway, and I think that this is a critical point, and the hypothetical question should be strictly limited to the evidence.

The Court: That is what the Court requires specifically. I ask you, do you contend that there is any evidence in the case, no matter by whom adduced, that the distance away was what you stated in the supposititious question?

Mr. Riley: Yes, your Honor.

(Testimony of John Cunningham.)

The Court: Was any of it stated in support of the affirmative defense?

Mr. Riley: Well, Mr. Cox and Mr. Leonard and Mr. Sanders all testified that the aircraft crashed approximately one-half to three-quarters [1076] of a mile offshore from the runway at Sandspit, British Columbia, in the waters of Hecate Strait, and that is simply what I have stated in my hypothetical question.

The Court: You did not state more than that?

Mr. Riley: I will reread that portion of the hypothetical question.

(Last question read by reporter.)

Mr. Koch: I state the testimony of those witnesses, plus Mr. Matthews, all put the crash site as one-half mile offshore.

The Court: The objection is overruled, for the purpose of rebuttal only, not for the purpose of supporting the allegations of the complaint. This supposititious question may be propounded to this witness, the objection thereto being overruled. Does the witness have to have the question restated? If so, the Court will gladly have it done.

The Witness: No, your Honor. My opinion is that the said Act would not be applicable.

Q. And would you state why you have so concluded?

A. The Families' Compensation Act——

Mr. Koch: Just a moment, please. Now, again I must object, your Honor, because it would appear that there is now an attempt to establish the appli-

(Testimony of John Cunningham.)

cability, perhaps, at least as far as I can tell from [1077] the question, of some other law, and, if so, that is certainly not in rebuttal to the proof in support of the affirmative defense.

Mr. Riley: This is strictly in rebuttal. We are not trying to prove any law.

The Court: The objection is overruled. You may state your reasons.

The Witness: The Families' Compensation Act of British Columbia has no extra-territorial operation, and the territorial jurisdiction of Canada and the right of the province ends at low water mark, at low water, and under the stated facts and in view of that fact, that is one reason.

The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States. Also——

Mr. Koch: I don't think this is responsive. [1078]

The Court: I believe that is sufficient.

Mr. Riley: I have no further questions, if the Court please.

(Testimony of John Cunningham.)

The Court: You may cross examine.

Mr. Koch: May I have a moment to confer with Mr. Bird, your Honor?

The Court: Yes, you may.

Cross Examination

Q. (By Mr. Koch): Isn't it true that if the accident took place above the low water mark, that then the matter would not involve the extra-territorial application of the Families' Compensation Act? A. The——

Q. Either yes or no. A. No.

Q. Your answer is no, that the Families' Compensation Act would still not be applicable?

A. It still would not be applicable. It relates to the commission of the tort.

Q. I am not referring to that part of your testimony. You said that the Families' Compensation Act does not have extra-territorial force?

A. Operation. [1079]

Q. Does the Families' Compensation Act operate to low water mark, from the shore outward to low water mark?

A. That is correct. That is the extent of the British Columbia territorial jurisdiction.

Q. So if the accident happened at or above low water mark, the Families' Compensation Act, if it were otherwise applicable, would apply?

Mr. Riley: I object. That is outside the scope of direct examination. He is using the term

(Testimony of John Cunningham.)

“would”. The allegation on the defendant’s affirmative defense is “could” apply.

The Court: The objection is sustained.

Q. Does the Families’ Compensation Act apply in the territory of British Columbia down to low water mark in cases in which the Act is properly invoked?

Mr. Riley: I will restate the same objection.

The Court: The objection is overruled. You may answer this time, but not any more than this time. You have already answered once.

The Witness: I believe I have answered that the territorial jurisdiction of the province extends down to the low water mark, and the Families’ Compensation Act, those sections are part of a provincial statute.

Q. If I understood your statement near the end of your direct examination, you stated that the tort [1080] is where the wrongful act takes place?

A. That is my opinion, and that is the law.

The Court: Is that your opinion under the provisions of Canadian law?

The Witness: Canadian law applying English law.

Q. What Canadian authorities support that view?

A. There is a case, *George Monroe, Ltd., vs. American Cyanamid Corporation, Ltd.*, 1944, 1 King’s Bench 432, which has been approved in a conflict of law text, and the case itself has been referred to in British Columbia courts.

(Testimony of John Cunningham.)

Q. Is that a British Columbia decision?

A. That is a decision of the Court of Appeals in England, I believe.

Q. Is that a decision binding on the British Columbia courts?

A. It is not necessarily binding, but it is my opinion it would be followed by the British Columbia courts.

Q. We are only concerned with what the controlling authority is in British Columbia. Is there any British Columbia case on that subject so holding?

A. The American Cyanamid case has been quoted and referred to in a British Columbia case.

Q. Is there any decision holding that the tort is where the wrongful act takes place, decided by a court of last appeal in British Columbia?

A. There may be, but I cannot cite it if there [1081] is one, and I do not know it.

Q. Can you cite a Supreme Court of Canada decision to that effect? A. No, I cannot.

Q. Are there decisions in British Columbia or from the Supreme Court of Canada holding that the law of the place where the impact occurs is the law which shall be applied in determining the situs of the tort?

Mr. Riley: If the Court please, counsel is going way beyond the scope of direct examination. Unless he is directing these questions for the purpose of impeaching our witness, I think that they should be objected to and he should be stopped from in-

(Testimony of John Cunningham.)

quiring further along this line. He has not alleged himself what the substantive law or what the construction of Canadian law is. He has alleged simply two sections of the statute could be applicable. He has alleged none of the cases or any case law referring to any of it, and this is outside of our evidence, which is offered strictly in rebuttal of that which he offered.

The Court: If he seeks to find if there is any court construction of statute law which is pleaded, the Court overrules the objection, if that is the purpose of it.

Mr. Koch: Yes, your Honor. I didn't think I was going beyond it. The question Mr. Riley asked elicited the answer the tort is where the wrongful act takes place. [1082] I am trying to find out if there isn't——

The Court: The objection is overruled.

The Witness: My answer would be that the facts would determine where the wrongful act took place. There may be facts where an impact is——

Q. That is not an answer to my question. Read the question, please.

(Last question read by reporter.)

A. You refer to an impact? You mean an aircraft impact or—I am afraid that I cannot in my own mind place impact and wrongful act together.

Q. Let me see if I can explain what I mean. I understood you to testify that the——

The Court: I would rather you would not do that. Ask him a question, will you, please?

(Testimony of John Cunningham.)

Q. When you say the tort is where the wrongful act takes place, what do you mean by wrongful act?

A. Is that not a matter of fact?

Q. Are you talking about the negligence of the carrier, or the place where all that culminated in injury?

A. I am referring to a wrongful act. I am not defining what a wrongful act is. I have not heard the conduct, if you are referring to this particular case.

Q. Is it your understanding that the conflicts of law rule applicable in the case of torts is that the court shall [1083] apply the law of the place where the injury is caused, where the injury takes place?

A. No, where the wrongful act took place.

Q. Are there cases in British Columbia or in the Supreme Court of Canada that hold that the conflicts rule to be applied there shall be the law of the place where those negligent acts resulting in injury and the injury——

A. Perhaps if I could refer to the Cyanamid case to illustrate——

Q. Just answer the question. Are there cases to hold it is the place of impact, the place where the injury was caused, that determines the law applicable, the law of that place is the law applicable to the tort?

A. If the wrongful act took place in the same place, there presumably would be decisions.

Q. I will ask it one other way. If negligence takes place in Washington and it culminates in

(Testimony of John Cunningham.)

injury and damage to a plaintiff in British Columbia, will the British Columbia law apply the law of British Columbia or the law of Washington?

A. Well, the conflicts rule arising out of this Cyanamid case is to the effect that where there are acts leading to an injury in one place, the plaintiff has the choice in that case of the——

Q. This is a decision in England many years ago. I am trying [1084] to find out if there are any laws in British Columbia or the Supreme Court of Canada which would answer the question I have just propounded.

Mr. Riley: I will object. That question has been asked six times.

The Court: I think he said previously what his opinion was, but you may repeat what your opinion is.

Mr. Koch: Your Honor, I am not asking his opinion. I am asking him his knowledge of the authorities on this point.

The Court: I don't see how you could separate it from his opinion as to what the fact is.

Mr. Koch: I want to know if there are cases in British Columbia or——

The Court: He might think the case did, and you might think that case didn't.

Mr. Koch: I have authority with respect to this that I would like to cite to the Court, if the Court wishes.

The Court: I do not. Proceed.

(Testimony of John Cunningham.)

Mr. Koch: His opinion is not relevant. It is only what the decisions are.

The Witness: I am basing my——

The Court: Proceed.

Mr. Koch: Read the question, please.

(Last question read by reporter.) [1085]

The Witness: It would be a matter for the court to determine, where the wrongful acts took place.

Mr. Koch: I have no further questions.

Mr. Riley: I have no further questions.

The Court: Do you wish this witness to be excused?

Mr. Riley: Yes, your Honor. I would like to take exception to the defendant's witness conferring with counsel at counsel table.

The Court: The Court asks defendant's counsel to give attention. This witness, like the other witness who was a member of the Canadian Bar, or the Bar of British Columbia, is excused with the Court's statement that it is always a pleasure to have appear in this Court any member of the British Columbia Bar. I ask both the witness Cunningham and the witness Bird to extend my warmest respects to Mr. Justice Sidney Smith of your Admiralty Court.

Mr. Cunningham: We will be very happy to do so, your Honor. Thank you.

(The witness was excused.)

The Court: Call the next rebuttal witness.

Mr. Riley: That concludes our rebuttal, if the Court please.

The Court: Do the plaintiffs rest?

Mr. Riley: Plaintiffs do rest, if the Court please.

The Court: Does the defendant rest?

Mr. Koch: May I confer for just a moment?

The Court: You may confer with your co-counsel.

Mr. Koch: I will call Mr. Bird.

Mr. Riley: I will take exception to recalling Mr. Bird, unless it is—I take exception, period.

The Court: You will have to state for what purpose you wish to pursue surrebuttal.

Mr. Koch: I wish to ask him whether his views of the law differ from those expressed by——

The Court: He has already given his views originally.

Mr. Koch: Not on this last point, about what law applies to the wrongful act.

The Court: I call attention to the fact that the plaintiffs have the right to close the offering and giving of testimony in this case.

Mr. Koch: Your Honor, if the Court is ruling that I cannot call Mr. Bird, I wish to take exception and make an offer of proof.

The Court: I wish to call attention to the fact that the plaintiffs have the right to call the last witness in this case, if the plaintiffs wish to, and if you are given the opportunity of adducing surrebuttal, the plaintiffs will have the right to offer sur-surrebuttal. Do you understand that? [1087]

Mr. Koch: I appreciate that. I want to ask one question.

The Court: Let that witness come forward in surrebuttal. [1088]

JOHN IRVINE BIRD

recalled as a witness in surrebuttal by defendant, was sworn and testified as follows:

Direct Examination

Q. (By Mr. Koch): Mr. Bird, if negligence takes place in the State of Washington culminating in injury and impact to a party in British Columbia, and litigation involving that circumstance is before the courts of British Columbia, what tort law would the British Columbia court apply?

A. It would apply the law of British Columbia where the death or injury occurred.

Q. And if it were only an injury, what then?

A. It would apply the same law.

Q. Can you explain your answer?

Mr. Riley: I will object. Counsel is going completely outside of the rebuttal.

The Court: I believe the Court will not hear any more explanation. The objection is sustained. The Court will consider his answer.

Q. Under those circumstances, would the court in British Columbia have an option of applying the law of the United States in the conflicts of law situation that would be [1089] presented?

A. Not in a tort action. It would apply the law of the place where the death or injury occurred.

Mr. Koch: I have no further questions.

(Testimony of John Irvine Bird.)

Cross Examination

Q. (By Mr. Riley): Would not the courts of British Columbia ordinarily follow the King's Bench decision if the King's Bench decision were in conflict with the highest court of the Province of British Columbia decision?

A. Oh, no. It is not bound by a King's Bench decision in England, if I understood you correctly.

Q. Is it not true that they would ordinarily follow a King's Bench decision?

A. No. They are bound only by the Privy Council on appeals coming from Canada.

Mr. Riley: I have no further questions.

Mr. Koch: I have no further questions.

The Court: The witness is excused.

(The witness was excused.) [1090]

The Court: Does the defendant rest?

Mr. Koch: Yes, your Honor.

Mr. Riley: May I confer a moment?

The Court: You may do so.

Mr. Riley: We would like to recall for one question Mr. Cunningham.

The Court: The plaintiffs may in sur-surrebuttal recall that witness. This will terminate the taking of testimony. [1091]

JOHN CUNNINGHAM

recalled as a witness in sur-surrebuttal by the plaintiffs, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riley): Mr. Cunningham, you have

(Testimony of John Cunningham.)

stated several reasons why in your opinion Sections 3 and 5 of the British Columbia Families' Compensation Act would not apply in the state of facts recited earlier. Do you have any other reason?

Mr. Koch: I object to that statement of the question.

The Court: The objection is sustained. Just ask him a question or call his attention to one thing that you understood him to say, and ask him if he did say it, and then propound the question. In other words, the Court might not take the view of what he said which you have just recited.

Q. Do you have any other reasons why Sections 3 and 5 of the British Columbia Families' Compensation Act——

Mr. Koch: I object, your Honor.

The Court: That is not proper. Please call his attention to something you wish cleared up, if it has been said or if it held a fact so-and-so, based upon what you think some witness has said that is controverted by some [1092] other witness. You may pursue it in that fashion.

Q. Mr. Cunningham, calling your attention to your testimony earlier wherein——

The Court: That may not be done in surrebuttal. It should be something that was developed in surrebuttal, Mr. Riley, some conflict that arose further by reason of the surrebuttal.

Mr. Riley: Yes, your Honor.

Q. Do the courts of the provinces of Canada ordinarily follow decisions of the King's Bench?

(Testimony of John Cunningham.)

Mr. Koch: Just a moment. That is a very leading statement.

The Court: The objection is overruled.

A. The Courts in British Columbia would be persuaded by higher courts in England, but they are not bound by them.

The Court: You should say specifically whether that is true with the King's Bench decisions.

The Witness: They would not be bound by the King's Bench decisions.

Q. In the absence of any other decisions in British Columbia as to a point of law which has been passed upon by a decision of the King's Bench, would the King's Bench decision be a guide to the British Columbia court?

Mr. Koch: Before you answer, I object to the statement of the question and to the attempt to elicit an [1093] opinion. He can only ask what the authorities are, what the decisions are, without what this witness believes would happen.

The Court: The objection is overruled.

The Witness: I can only say that that would be persuasive and may be followed. The courts in British Columbia are not bound.

Mr. Riley: I have no further questions.

Mr. Koch: No questions.

The Court: You may step down.

(The witness was excused.)

Mr. Riley: I have nothing further. Plaintiffs do rest in each case.

The Court: Does the defendant rest?

Mr. Koch: Yes, your Honor.

The Court: All witnesses in this case and all others attending the trial other than the parties and counsel may now be excused. The taking of testimony is ended.

(Discussion among Court and counsel re length of arguments.)

(Arguments of counsel.)

(Court's decision previously furnished.)

[Endorsed]: Filed Aug. 13, 1957.

[Title of District Court and Cause.]

DEPOSITION OF LEE ROY WALDREP

Taken at Jasper, Alabama, offices of Elliott & Jackson, Attorneys, March 1, 1957, 10:45 A.M.

Appearances: Hon. Hoyt Elliott, Elliott & Jackson, Attorneys, Jasper, Ala. Hon. Bibb Allen, 1103 Comer Building, Birmingham, Alabama. [1]

Stipulation

Dictated by Mr. Allen: It is hereby stipulated between the parties that all objections, except as to form of the question, be reserved until the time of trial.

LEE ROY WALDREP

having been first duly sworn, testified as follows on

Examination

Q. (By Mr. Elliott): State your name, please?

A. L. R. Waldrep.

Q. Those are your initials?

(Deposition of Lee Roy Waldrep.)

A. Yes, my full name is Lee Roy.

Q. How do you spell that?

A. Capital L-e-e, Capital R-o-y, W-a-l-d-r-e-p.

Q. Where do you live, Mr. Waldrep?

A. 1900 Tenth Avenue, Jasper, Alabama.

Q. How long have you lived there?

A. Since 1930, twenty-six years.

Q. At the same address? A. Yes, sir.

Q. What relation, if any, are you to John M. Waldrep? A. Father.

Q. What does the "M." in his name stand for?

A. Milton. M-i-l-t-o-n.

Q. Is he still living? [2] A. No.

Q. How long has he been dead?

A. Since January 19, 1952.

Q. When was he born?

A. August 11, 1927.

Q. How old was he at the time of his death?

A. I would have to figure that—twenty-four I believe.

Q. You think that is the age he was at the time of his death? A. Yes.

Q. What occupation, if you know, was he engaged in at the time of his death?

A. He was in the United States Army.

Q. Had he lived with you from the time of his birth up until the time he entered military service?

A. Yes, sir.

Q. I will ask you to tell the Court Reporter here what educational courses he took, if any, beginning with his first years in school, and where he went.

(Deposition of Lee Roy Waldrep.)

A. He attended Central Elementary School——

Q. That is here in Jasper?

A. Yes. And two years at Walker County high school.

Q. Was that before he went into any kind of service? A. Yes, sir.

Q. When did he discontinue his educational program if you remember, at what age?

A. Sixteen. [3]

Q. Prior to stopping school, had he been employed anywhere that you know of?

A. No, sir.

Q. During those years between childhood and through the age of sixteen, he was living in the home with you? A. Yes, sir.

Q. You say he finished elementary school, and how many years of high school? A. Two.

Q. That would have made him through what grade in school?

A. That would have been the tenth, wouldn't it?

Q. During that period of time, did you have occasion and opportunity to observe his physical condition and the state of his health, as to whether or not he was subject to any disease?

A. I did.

Q. Did he have any diseases that you know of?

A. No, sir.

Q. Did he have any of the childhood diseases so far as you can remember?

A. I believe he had whooping cough, and measles, that is all I remember.

(Deposition of Lee Roy Waldrep.)

Q. Was he treated by a doctor for those childhood diseases, or do you remember?

A. I think maybe the family doctor saw him, several members [4] of the family was sick and he saw them all at the same time.

Q. Did you have an opportunity to observe him in his physical activities after he had those childhood diseases? A. Yes, sir.

Q. Did you observe anything wrong with him, so far as you could tell? A. No, sir.

Q. Did he have any disabling effects, so far as you could tell? A. No, sir.

Q. Was he ever involved in any accidents?

A. No, sir.

Q. How tall was he?

A. I believe the record shows seventy inches, I just looked at his discharge over there.

Q. That would be five feet ten inches?

A. Yes, sir.

Q. Was he apparently in good health?

A. He certainly was.

Mr. Allen: Are you talking about before he entered the service?

The Witness: Yes, sir.

Q. That was the time just when he finished the last grade in school? A. Yes, sir.

Q. Where did he go after he left school? [5]

A. He joined the Merchant Marines.

Q. Where did he join the Merchant Marines?

A. I am not sure, I think Mobile—or Pensacola.

(Deposition of Lee Roy Waldrep.)

Q. Do you know who he worked for in the Merchant Marines?

A. No, I don't remember the Company.

Q. Do you know how old he was when he joined the Merchant Marines? A. Sixteen.

Q. Was it necessary for you to sign a consent in order for him to join? A. Yes, sir.

Q. Did you sign that consent?

A. Yes, sir.

Q. How long did he continue in the Merchant Marines? A. Two years.

Q. Was he at home from time to time during that period?

A. He was at home two or three times, he wasn't at home very much during that time, he was in the Pacific most of the time.

Q. Did you see him at the times he was home?

A. Yes, sir.

Q. So far as you could tell, was he in good health during that time? A. He was.

Q. Did he sign up for any definite length of time when he went with the Merchant Marines?

A. I think it was two years, but I wouldn't be positive. [6]

Q. Did he stay with the Merchant Marines two years? A. Yes, sir, approximately.

Q. Do you know anything about the circumstances under which he separated from the Merchant Marines, as to whether or not he was in good standing at that time?

(Deposition of Lee Roy Waldrep.)

A. He was in good standing.

Q. Do you know anything about his earnings during that period of time?

A. No, sir, I couldn't testify as to that.

Q. Do you know anything about the pay rating in the Merchant Marines, as to whether or not they have definite pay grades?

A. Of my own knowledge I would say I do not.

Q. But he did continue with them for a period of two years, and his work was satisfactory, so far as you know?

Mr. Allen: I object to the question in the suggested form.

A. Yes, sir.

Q. Was he married during that period of service in the Merchant Marines? A. No, sir.

Q. What year did he enter the U. S. Merchant Marines, if you know? A. 1943.

Q. And he remained with them two years.

A. Yes, sir.

Q. He was discharged from the Merchant Marines in what year? [7]

A. I believe it was in the spring of 1946, my best recollection.

Q. Did he return home when he was discharged?

A. Yes, sir.

Q. Did he come back and reside with you in your home in Jasper, Alabama?

Mr. Allen: I object, leading and suggestive.

A. Yes, sir.

Q. Where did he go after he was discharged?

(Deposition of Lee Roy Waldrep.)

A. He came home.

Q. Did you observe him after his return home?

A. Yes, he was a member of the family.

Q. Did he appear in good physical health?

A. Yes, he did.

Q. Had he lost weight, or gained weight, or do you remember any change?

A. He had gained some weight, I don't know how much.

Q. Did he wear glasses? A. No.

Q. How long did he stay in the home with you after he returned from the Merchant Marines?

A. Approximately five or six months.

Q. Did he work any during that period of time?

A. Yes, sir.

Q. Where did he work, if you know. [8]

A. He worked with me, I was farming at that time.

Q. What kind of work did he do?

A. General farm work, plowing, cultivating, planting, and building pastures, just general farming.

Q. Did you pay him on any kind of a pay basis during that period?

A. No, not a stipulated salary, I did pay him some, but it varied.

Q. Was he residing in your home at that time?

A. Yes.

Q. Were you charging him anything for his room and board during that period of time?

(Deposition of Lee Roy Waldrep.)

A. No, he was more or less considered a member of the family, there was no specific charge.

Q. Do you remember how much you paid him over and above his room and board?

A. I imagine on an average of fifteen or twenty dollars a week.

Q. Was that throughout the period of five or six months you have testified about?

A. Yes, sir.

Q. At the end of that period of time, so far as you know, was his physical condition good?

A. Yes, sir.

Q. Had he been sick during that period of time? A. No.

Q. Had he been to any doctors that you know of? [9] A. No.

Q. Had he been in any accidents, or disabled in any way? A. No.

Q. What did he do or where did he go following that period of time?

A. He enlisted in the U. S. Marines.

Q. Where did he enlist?

A. In Birmingham.

Q. In the United States Marine Corps?

A. Yes, sir.

Q. When was that?

A. The 15th day of July, 1946. That is a matter of record in the court house.

Q. How old was he at that time, if you remember? A. He would have been seventeen——

(Deposition of Lee Roy Waldrep.)

Q. You know the date of his birth, you can use a pencil there.

A. I believe he would have been nineteen in August following.

Q. Following the date of his enlistment?

A. Yes.

Q. Was it necessary to give your consent to his enlistment?

A. No, I didn't give my consent because he was over eighteen.

Q. Do you know for how long a period of time he enlisted? A. Two years.

Q. Do you know where he was stationed during that period of time? [10]

A. Camp LeJeune, North Carolina.

Q. Do you know how to spell it?

A. L-e-J-u-e-n-e.

Q. Did he stay at Camp LeJuene during the period of his enlistment?

A. I believe he did.

Q. Was he at home any during the period of his enlistment?

A. He came home two or three times.

Q. Do you know anything about the nature of the training he had during that period?

A. No, I know what his job was, he was in the Fire Fighters Squadron.

Q. Do you know whether he underwent the usual Marine Corps basic training?

A. Yes, sir.

Q. Was he in the hospital during that period

(Deposition of Lee Roy Waldrep.)

of time, so far as you know? A. No.

Q. Was he sick any during that period of time, so far as you know?

A. Not that I know of.

Q. Did he start wearing glasses during that period of time? A. He never wore glasses.

Q. Did you have occasion to see him when he would come home on leave from his training in the Marine Corps? [11] A. Yes, sir.

Q. Was he in good physical condition?

A. He was.

Q. Did he do any work for you when he was on leave from the Marine Corps? A. Yes, sir.

Q. What kind of work did he do?

A. Farm work. General farm work, in the crop.

Q. Did he plow? A. Yes, sir.

Q. Did he do any gathering of any crops?

A. I couldn't be positive whether he was at home during gathering time.

Q. What was the average hours per day he would work when he was plowing?

A. He worked long hours.

Q. How many, would you say?

A. At least twelve hours.

Q. Would he plow for full twelve hours?

A. Yes, sir.

Q. Did he have any trouble holding up for that length of time? A. No, sir.

Q. Was he then later discharged from the Marine Corps? A. Yes, sir.

(Deposition of Lee Roy Waldrep.)

Q. Did he receive an honorable discharge? [12]

A. Yes, he received an honorable discharge on January 30, 1948.

Q. Did he return home following his discharge from the Marine Corps? A. He did.

Q. How long did he live with you at that time?

A. I would say about eight months.

Q. That is following his Marine Corps service?

A. Yes, the U. S. Marine Corps.

Q. Did he work anywhere during that period of eight months? A. Yes, sir.

Q. Did he attend school any during that eight months period? A. Yes, sir.

Q. Where did he go to school?

A. Walker County high school.

Q. Do you know what grade he entered in the Walker County high school? A. No, I don't.

Q. Had he finished, prior to the time he discontinued his education and went into the Merchant Marines—you testified that a while ago—he had finished what grade?

A. My recollection is, the tenth.

Q. After he returned from the Marine Corps, and went back to school, how many grades did he complete if you know? A. I don't know. [13]

Q. How long did he go to school?

A. My recollection is he went from about January of 1948—no—January of 1949—until along in the summer.

Q. He was going to school under the G.I. Bill, was he not?

(Deposition of Lee Roy Waldrep.)

A. Yes, he was going to school and working. He was going to school at night, and working for Vines Brothers Motor Company as a mechanic during the day.

Q. Do you know how much progress in his grades he made during the time he attended school?

A. No, I don't know, anything I would say about that would be a guess.

Q. Do you know whether he finished high school or not? A. No, I don't.

Q. How long did he work for Vines Brothers Motor Company?

A. I would say six to eight months.

Q. Did you know how much he was making?

A. Yes, I saw some of his pay envelopes, I believe they run from \$25.00 to \$30.00 a week, they varied some I think on account of the number of hours he worked.

Q. Was that tied in with his G.I. training program? A. I understand it was.

Q. During that period when he was working for Vines Brothers Motor Company, was he also going to G.I. night school? A. He was.

Q. And what he was receiving from G.I. night school was in [14] addition to his pay from Vines Brothers Motors, or do you know?

A. I understand that it was in addition.

Q. What kind of work did he do for Vines Brothers Motor Co.? A. He was a mechanic.

Q. Was he doing any work for you during that period of time?

(Deposition of Lee Roy Waldrep.)

A. Not during that period.

Q. Was he staying in the home with you?

A. Yes, sir.

Q. Did you see him frequently?

A. I did.

Q. He ate his meals with you? A. Yes, sir.

Q. And slept in your house? A. Yes, sir.

Q. Did you have an opportunity to observe his physical condition? A. I did.

Q. Did it appear to be good?

A. Yes, sir.

Q. Was he sick any during that eight months period? A. No, sir.

Q. Did he have any accidents that you know of?

A. No, sir.

Q. At the end of that six months period, what happened after that? [15]

A. He joined the U. S. Army.

Q. That was about when?

A. Approximately—it was autumn of 1949, early fall I would say or late summer, I don't have the date on that but it was either late summer or early fall.

Q. How old are you, Mr. Waldrep?

A. Sixty-seven.

Q. How many children do you have living at this time? A. Nine.

Q. With John Milton Waldrep you had ten children? A. Yes, sir.

Q. Any of them deceased?

A. None except him.

(Deposition of Lee Roy Waldrep.)

Q. All living except him? A. That's right.

Q. Do you know the circumstances under which he entered the service this last period you started to testify about—did he enlist? A. Yes, sir.

Q. Do you know what branch of the service he enlisted in? A. The army.

Q. Do you know how long his enlistment was?

A. Four years, I believe.

Q. Do you know where he went at the time he enlisted? A. Fort Jackson, South Carolina.

Q. How long did he remain there?

A. I couldn't say, it would have to be a guess.

Q. Do you know where he went following his period at Fort Jackson?

A. No, I don't remember where he went from there, but I know he ended up in El Paso, Texas.

Q. Did you have occasion to see him between the time he entered the service and the time he went to El Paso? A. Yes, sir.

Q. Did you observe his physical condition?

A. Yes.

Q. Did he appear to be in good physical condition? A. Yes, sir.

Q. Was he in the hospital any that you know of? A. No.

Q. Did he marry while he was stationed in El Paso? A. He did.

Q. To whom did he get married?

A. Fay Kelly.

Q. Had he ever been married prior to that time?

A. No, sir.

(Deposition of Lee Roy Waldrep.)

Q. How long was it following the date he married Fay Kelly until he was transferred from his station in El Paso?

A. He married in the spring, before Easter, and my best recollection is that he went overseas, to Korea, the following fall. I couldn't give you the dates, I couldn't [17] be positive even to the month.

Q. How long was he in Korea?

A. I would say approximately three or four months.

Q. Where did he go from Korea, if you know?

* * * * *

Q. Had his wife remained in Texas during that period of time after he left for Korea?

A. She did.

Q. What was the nature of the emergency bringing him home in 1952, if you know?

A. Premature birth of the baby.

Q. That is the child of the marriage of Fay Kelly and John M. Waldrep, your son?

A. Yes, sir.

Q. Was that child born before he got back to the State, or after?

A. It was born after his death.

Q. When was he killed?

A. January 19, 1952. [18]

* * * * *

Q. I will ask you if it isn't a fact that he was on his way home from Korea in January 1952?

(Deposition of Lee Roy Waldrep.)

Mr. Allen: I object to that, leading and suggestive.

Q. How do you know, if you do know, that he was on his way home from Korea in 1952?

Mr. Allen: I object to that, leading and suggestive. A. I did know he was on his way home.

Q. How did you know?

A. By his wife's mother calling me on the telephone.

* * * * *

Q. Did you get any word from any source of the crash?

Mr. Allen: I object, leading and suggestive.

A. Yes, sir.

Q. What was the nature of the information you received regarding an airplane crash?

Mr. Allen: I object, leading and suggestive.

A. I got a telegram from the War Department.

Q. What did that telegram state? [19]

* * * * *

Q. His wife was living at that time?

A. Yes.

Q. Had her child been born at that time?

A. No.

Q. Had your son had any previous marriages, before the marriage to Fay Kelly? A. No, sir.

Q. Was the child later born? A. Yes, sir.

Q. What was the child named?

A. Judith Anne.

Q. The full name?

(Deposition of Lee Roy Waldrep.)

A. Judith Anne Waldrep.

Q. Where was the child born?

A. Southwestern General Hospital, El Paso, Texas.

Q. What was the date of its birth, if you know?

A. January 22, 1952.

Q. And your son had lost his life when?

A. January 19, prior to that.

Q. Is John Milton Waldrep's wife, Fay Kelly Waldrep, still living? A. No. [20]

Q. When did she die?

A. She died—I don't remember definitely—but she died on the Sunday before Easter Sunday in 1953.

Q. Was that approximately one year after the death of her husband?

A. A little over a year.

Q. Was your son's body returned to the States for burial? A. It was.

Q. Where was he buried? A. Here.

Q. In Jasper, Walker County, Alabama?

A. Yes.

Q. In what cemetery?

A. Oak Hill Cemetery.

Q. When was that?

A. It was either the 30 or 31st of January.

Q. Of what year? A. 1952.

Q. How long had it been prior to that time since you had last seen John Milton Waldrep?

A. It had been approximately four or five

(Deposition of Lee Roy Waldrep.)

months, he came home to visit us before he went to Korea.

Q. Was that after his marriage to Fay Kelly?

A. Yes, sir.

Q. Was she with him at the time? [21]

A. No, sir.

Q. She didn't come to Jasper with him?

A. No.

Q. Was she at that time in good health, or do you know about that?

A. Just hearsay is all, I understood her health was not too good at that time.

Q. You had an opportunity to observe your son's physical condition at the time he returned home before leaving for Korea, did he appear to be in good physical condition at that time?

A. Excellent.

Q. How long did he stay at home with you at that time?

A. He didn't stay but a little while, I would say he was here two or three days.

Q. Did he sleep in your home and eat his meals with you? A. Yes, sir.

Q. Do you know what rank he held in the military service at the time of his death?

A. He was a sergeant.

Q. Do you know what the pay of a sergeant was? A. No, I don't.

Q. You don't know what he was making at that time? A. No, I don't.

(Deposition of Lee Roy Waldrep.)

Q. You have how many other children living now? [22] A. Nine.

Q. How old is the youngest one?

A. Twenty-four.

Q. How old is the oldest one?

A. Thirty-nine or forty—I would have to figure—forty. Will be forty-one this coming November.

Mr. Allen: You are asking about other children of his?

Mr. Elliott: That's right.

Q. Is Mrs. Waldrep still living?

A. Yes, sir.

Q. How old is she? A. Sixty-four.

Q. Is she in good health?

A. I would say fair, yes.

* * * * *

Q. Was he honorably discharged from the U. S. Marine Corps? A. Yes, he was.

Q. Do you know what rank he held at the time of his discharge?

A. No, I don't, I saw his record in the Probate Office but I don't remember.

Q. Do you know how much he was making in the U. S. Marine Corps?

A. I would say ninety or one hundred dollars a month.

Q. Do you know whether or not he received certain other [23] allowances in the way of lodging and his meals in addition to the cash he received?

A. Yes, he did.

Q. Do you know whether or not he received

(Deposition of Lee Roy Waldrep.)

clothing in addition to that? A. He did, yes.

Q. Did you ever see his wife in Texas?

A. I never saw her.

Q. You never saw her during her life time?

A. Oh, yes. I never saw her before they married,
I saw her after his death.

Q. Did she attend his funeral?

A. No, sir.

Q. Did she visit you in Walker County?

A. No, sir.

Q. Did you visit her in Texas? A. Yes.

Q. Who went with you on that visit?

A. My wife and two daughters.

Q. Was that after the birth of your grand
daughter? A. Yes, sir.

Q. Did you see Judith Anne Waldrep?

A. Yes, sir.

Q. Is she now living? A. Yes, sir. [24]

Q. Where does she live?

A. Alamagordo, New Mexico.

Q. Do you know the street address?

A. No.

Q. Do you know the mailing address?

A. I believe it is Post Office Box 501, is my rec-
ollection.

Q. She does get her mail at a Post Office box?

A. Yes, sir.

Q. How old is she now?

A. You mean the girl, Judith Anne?

Q. Yes.

A. She is six—no, she is just five years old.

(Deposition of Lee Roy Waldrep.)

Q. Who is she living with there?

A. With her grandmother and grandfather, and an aunt.

Q. What is the grandparents' name?

A. Mr. and Mrs. J. T. Kelly.

Q. Do they live in Alamagordo, New Mexico?

A. Yes.

Q. What is the aunt's name that you referred to? A. Mrs. Fern Bloth.

Q. And she also lives in Alamagordo?

A. Yes.

Q. On your visit to Texas that you testified about, how old was the baby at that time?

A. At the time I visited, she was two weeks old. My wife [25] and some of the daughters visited her a short time after her birth and after John's death.

Q. Did you visit with them in their home?

A. Yes, sir.

Q. And you saw Sergeant John M. Waldrep's wife at that time? A. Yes, sir.

Q. How long did you stay there on that visit?

A. About three days, I believe.

Q. Was Sgt. Waldrep in the hospital any while he was in Korea that you know of?

A. No, sir.

Q. Did you receive any word from any source that his physical condition was deteriorating during that period? A. No, sir.

Mr. Elliott: That is all at this time, I might

(Deposition of Lee Roy Waldrep.)

want to ask him some other questions later, if I may.

Mr. Allen: I think you have that right.

Examination

Q. (By Mr. Allen): Mr. Waldrep, how many years does your elementary school have here in Jasper? A. Seven, I believe.

Q. When your son joined the Merchant Marine, you say he was in the 10th grade?

A. I believe so. [26]

Q. Is that Junior High School, or High School?

A. At that time it was High School, in other words, after the seventh grade we went to what we called High School. At the present time we do have Junior High School.

Q. How many years did you have in high school at the time he entered? A. Four.

Q. In other words, seven years elementary school and four years high school?

A. I believe so.

Q. You testified that he went to high school two years, is that right? A. Yes, sir.

Q. And then joined the Merchant Marines?

A. Right.

Q. When he came back from the Merchant Marines, how long did he stay with you before he joined the Marines?

A. Oh, I would say approximately six months.

Q. He was approximately eighteen years old then.

(Deposition of Lee Roy Waldrep.)

And he came back and lived in the same house with you as a member of the family?

A. Yes, sir.

Q. And he did certain jobs around the house?

A. Yes, and on the farm.

Q. You testified you paid him fifteen or twenty dollars a week, is that just an estimate? [27]

A. That's just my best judgment.

Q. Did you pay by check, or how?

A. Sometimes I would, probably, sometimes I wouldn't.

Q. You didn't have any agreement to pay him anything, did you?

A. Yes, I believe I did, because I was farming pretty extensively at that time, and was hiring labor.

Q. How big a farm did you have, Mr. Waldrep?

A. I was farming with mules, I had, I believe that year I had a four horse operation.

Q. How many acres was that?

A. I would say approximately seventy-five or a hundred.

Q. How many in cultivation?

A. That is what I am talking about, in cultivation.

Q. He stayed there I believe you said about six months after he got out of the Merchant Marines?

A. Yes, six to eight months.

Q. In paying him, did you withhold any income tax or social security or anything like that?

(Deposition of Lee Roy Waldrep.)

Mr. Elliott: I object to that, I don't believe farm labor is subject to any withholding.

Q. I am just asking him. A. No, sir.

Q. Did he file an income tax report during that six months period or do you know?

A. I don't know. [28]

Q. Now when he enlisted in the Marines, where did he go? A. The U. S. Marines?

Q. Yes.

A. Camp Le Juene, North Carolina, is my recollection.

Q. How long did he stay there.

A. About two years, or two years and five months and a little better.

Q. Was he stationed at any other place during that period of time? A. Not that I know of.

Q. After he got out of the U. S. Marines, he came back to Jasper? A. Yes, sir.

Q. How long did he stay here then?

A. I would say about six or eight months.

Q. How long is a semester year in high school?

A. I believe it is nine months.

Q. Then when he came back from the Marines, he didn't get in a full semester of school, did he?

A. I couldn't say.

Q. How many months did he work for Vines Brothers as a mechanic?

A. He worked most of that period—a short time after he came back he got a job and worked there until he re-enlisted, I would say six to eight months.

Q. How old was he when he enlisted in the

(Deposition of Lee Roy Waldrep.)

Army? [29] A. Let's see—about twenty-two.

Q. That was in 1949? A. Yes, sir.

Q. Where did he go immediately after he enlisted?

A. My recollection it was Ft. Jackson, South Carolina.

Q. Do you know how long he stayed there?

A. No, sir, I don't.

Q. Do you have any judgment about it?

A. No, it would be a guess.

Q. Where did he go from there?

A. I believe he went from there to El Paso.

Q. Do you know approximately when he got to El Paso?

A. I believe it was in the Spring of 1951, my best judgment.

Q. Well, he must have stayed out there a little over a year. A. Something like that.

Q. How long did he stay in El Paso?

A. He stayed in El Paso all the time he was in the west, he was ordered from there overseas.

Q. What type job did he have in the Army?

A. Construction Engineers Corps.

Q. When did he become a Sergeant?

A. I couldn't say, but he was a Sergeant the last time he was home is all I know.

Q. That was when he was stationed in El Paso?

A. Yes, sir. [30]

Q. Was he a Buck Sergeant, or do you know the difference?

A. Yes, he was a Buck Sergeant, and then either

(Deposition of Lee Roy Waldrep.)

he was promoted to Staff Sergeant or he had a promotion coming up, I am not sure which.

Q. He was a Buck Sergeant so far as you know?

A. Yes, so far as I know.

Q. Mr. Waldrep, your son was never employed by anyone other than Vines Motor Company, and in the service as you have testified in the Merchant Marines, the U. S. Marines and the Army, is that right?

A. That's right.

Q. Do you know the salary he received from Vines Brothers?

A. Approximately, I saw his pay envelopes, I think I saw some of them at the house in looking through some things not long ago, it would run from twenty-five to thirty to thirty-three dollars, maybe sometimes as high as thirty-five.

Q. That is a week?

A. Yes, sir.

Q. During that time he was going to G. I. School and receiving money from the Government?

A. That's right.

Q. Do you know whether he ever filed any income tax returns?

A. I don't know.

Q. You don't have a copy of any of them, do you?

A. No, sir. [31]

Q. Do you know whether or not he had ever applied to the Government for any unemployment compensation?

A. No, I don't.

Q. Had he ever been in the hospital here in Jasper?

A. No, sir.

Q. Had he ever been in the hospital anywhere that you know of?

A. No.

(Deposition of Lee Roy Waldrep.)

Q. He had never had any operations to your knowledge? A. No, sir.

Q. Had he had any mental illnesses?

A. No, sir.

Q. Had he had diabetes? A. No, sir.

Q. Tuberculosis? A. No, sir.

Q. Malaria? A. No, sir.

Q. Did he have a Doctor here in Jasper?

A. The only time—I am just assuming he saw the family doctor, Dr. Jackson, when he had the measles. Two or three of the other children had it along with him, and I am assuming the Doctor saw them all at that time.

Q. When he was in the Marines you say he was in the Fire Fighting Squadron?

A. Yes, sir. [32]

Q. And when he was in the Army he was in the Engineers Corps?

A. Yes, Construction Engineers Corps.

Q. What type job did he do?

A. Constructed roads and bridges out in front, prepared the way for advance of the army.

Q. That is what he was training to do?

A. He was doing that.

Q. I am talking about the time in El Paso. He was not an Engineer, was he?

A. No, sir.

Q. So far as you know, he helped build the roads? A. Yes.

Q. What amount of G. I. insurance did he carry?

(Deposition of Lee Roy Waldrep.)

A. I understand he had \$10,000.00.

Q. Who did it go to?

A. To his wife and baby. Now I understand it is in a trust fund for the baby.

Q. Did he have any other life insurance?

A. Not that I know of.

Q. At the time of his alleged death, was there any back pay due him? A. I don't know.

Q. Do you know what his social security number was? A. No, I don't.

Q. Did he have a social security number? [32A]
* * * * *

Q. Had there been any other claims made against the United States Government, made on behalf of your son, has anybody made any claims against the U. S. Government on account of his death? A. Yes, I made a claim.

Q. What type claim is that?

A. I don't know what you call it—a dependency claim.

Q. Who did you file that claim with?

A. I don't know—the proper authorities.

Q. You filed a claim with the U. S. Government which you called a dependency claim?

A. Yes, sir.

Q. What is a dependency claim?

(Witness does not answer.)

Q. Is it alleging that you were a dependent of your son? A. To some extent, yes. [33]

Q. And claiming a pension?

(Deposition of Lee Roy Waldrep.)

A. Well, I don't know whether it was a pension or not.

Q. Did you file that claim here in Jasper?

A. No, I filed it with the proper authorities of the War Department.

Q. What action was taken on that?

A. It was approved for a small amount.

Q. Are you now receiving it?

A. Not now, I'm not.

Q. How long did you receive it?

A. Approximately two years.

Q. How much was it a month?

A. Forty dollars I believe, my wife and I.

Q. Eighty dollars a month for both of you?

A. Yes.

Q. And that went on for two years?

A. Yes, approximately.

Q. What was the reason for it being terminated?

A. Because of income sufficient I wasn't depending on it.

Q. You started making more income than the statute allowed you to make?

A. Yes. [34]

* * * * *

Q. And you were drawing on a dependency claim is that right?

A. Yes, sir.

Q. How long did his wife live after his death?

A. From January 19, 1952, until the last of March 1953, a little over a year. About a year and two months.

Q. Do you know whether or not she re-married

(Deposition of Lee Roy Waldrep.)

during that period of time? A. She did not.

Q. Where did she live during that period?

A. El Paso and Alamogordo, New Mexico.

Q. Who did you say the child is living with now, the grandparents?

A. The grandparents and an aunt. They live together.

Q. Has there been any other claim made against the Government for you or anyone that you know of other than the pension you have testified about?

A. No.

Q. Is the child receiving social security?

A. My understanding is that she is, I don't know of my own knowledge.

Q. That is being paid to the grandparents, I suppose? [35]

A. It is being paid to the First National Bank as guardian, I believe that is the way it is handled.

Q. Do you know how much it amounts to?

A. No.

Q. During the time your son was in the service, did he make any allotments to anyone?

A. Probably to his wife, I don't know.

Q. You don't know whether he did or not, is that your answer? A. No, I don't know.

Q. You don't know whether he ever requested a deduction from his pay while he was in the service or not, do you? A. No, I don't know.

Q. What is Mrs. Roth's full name?

A. I believe you will find it is Bloth. B-l-o-t-h.

* * * * *

(Deposition of Lee Roy Waldrep.)

Q. You testified a minute ago that so far as you knew your son had never been on sick call while in the Army or Marines, you don't know that to be a fact, you weren't there were you?

A. No, I wasn't there.

Q. He could have been, is that right?

A. I wouldn't think so without knowing it.

Q. Do you know whether or not your son's wife had ever been married prior to her marriage to him? [37]

A. Not to my knowledge.

Redirect Examination

* * * * *

Q. (By Mr. Elliott): Relative to the semester in high school that Mr. Allen asked [38] you about, after your son came out of the Marines I believe you testified he went to school about eight months, is that right?

A. Approximately.

Q. That was under the G. I. program?

A. Yes, sir.

Q. He went to school at night, or afternoon and night?

A. Yes, sir.

Q. Isn't it a fact that during that period of time he could advance more than one grade—in other words he wasn't on a semester basis, was he?

A. That is my understanding, yes.

Q. Mr. Waldrep, you are now in the Insurance business, aren't you?

A. Yes.

Q. You have taken up that profession or occupation since the date of your son's death?

(Deposition of Lee Roy Waldrep.)

A. Yes, after I went broke farming.

Q. There was a small policy on John's life made to his mother you say?

A. Yes, \$500.00 his mother had been carrying on him, but she discontinued paying the premiums, and it was something like three fifty or four hundred dollars after deduction of the premiums.

Q. You don't know exactly what she did get?

A. No, I have seen a record of it but I don't know.

Q. Would you say it was less than \$150.00?

A. My recollection is that it was between three and four hundred dollars.

/s/ LEE ROY WALDREP. [40]

[Endorsed]: Filed March 6, 1957.

[Title of District Court and Cause.]

DEPOSITION OF DONALD E. BAKER

Be It Remembered, that the deposition of Donald E. Baker, was taken at the instance of Plaintiffs on December 8, 1956, beginning at 10:00 a.m., at 3314 White Building, Seattle, King County, Washington, pursuant to stipulation between Counsel, before Orin E. Gray, a Notary Public;

John W. Riley, Esq., appearing on behalf of [1] Plaintiffs; Carl G. Koch, Esq., appearing on behalf of Defendant;

Whereupon, the following proceedings were had and done, to wit:

Mr. Riley: For the record, this is the deposition

(Deposition of Donald E. Baker.)

of Mr. Donald E. Baker taken pursuant to Rule 30 of the Rules of Civil Procedure. Carl, you correct me if this is not correct, the objections to the questions except as to the form are reserved until the time of trial, and it is stipulated that this deposition will be adjourned until Wednesday evening; that is, December 12th, at Mr. Koch's office, 1411 Fourth Avenue Building, Seattle, at 5:00 p.m.

Mr. Koch: For the purpose of conducting the cross examination at that time.

DONALD E. BAKER

being first duly sworn on oath was called as a witness on behalf of Plaintiffs and testified as follows:

Direct Examination

Q. (By Mr. Riley): Mr. Baker, state your full name for the record.

A. Donald Eugene Baker.

Q. Where do you reside, Mr. Baker, at this time?

A. I don't have a permanent address because I am traveling so often but can I give my address in Dearborn?

Q. Yes. A. It is Post Office Box——

Q. First of all, your address here in Seattle at this time?

A. 17545 Aurora Avenue, Garden Park Motel.

Q. And that is not your permanent residence?

A. No.

Q. Where is your permanent residence?

A. Dearborn, Michigan.

(Deposition of Donald E. Baker.)

Q. You have a post office box address there?

A. Yes.

Q. That is what?

A. Auditing Department, Ford Division, Ford Motor Company, Post Office Box 607, Dearborn, Michigan.

Q. What is your present occupation, Mr. Baker?

A. I am an auditor.

Q. For what company?

A. Ford Motor Company. [3]

Q. How long have you been employed by Ford Motor Company? A. Two and a half years.

Q. What was your occupation previous to that?

A. I was an auditor in public accounting, Salinas, California.

Q. For what period?

A. From March, 1953, until April of '54.

Q. Prior to 1953 what was your occupation?

A. I was in the United States Air Force at that time.

Q. Incidentally, how old are you, Mr. Baker?

A. 31.

Q. Were you in the Air Force on January 18, 1952? A. Yes, I was.

Q. Can you state where you were on that day?

A. January 18, I was on board a Northwest Airlines aircraft bound for the United States on emergency leave from Japan.

Q. What was your duty station at the time?

A. My duty station was Kunsong, Korea.

(Deposition of Donald E. Baker.)

Q. Were you on active flying status at that time?

A. Yes, I was in a combat flying outfit.

Q. Where did this flight, this Northwest Airlines flight on which you were a passenger on January 18, 1952, originate?

A. United States Air Base outside of Tokyo. [4]

Q. And what was the destination of that flight?

A. Seattle.

Q. How long were you in the Air Force or had you been in the Air Force at that time?

A. This was my second tour of duty. I had been on active duty approximately nine months at the time, and previous to that I had spent three and a half years in the Air Force during World War II.

Q. What was your capacity during World War II?

A. During World War II I was a navigator.

Q. And what type of aircraft were you flying?

A. Primarily B-24 heavy bombers.

Q. How much experience, flight experience, have you had in B-24 type aircraft?

A. Approximately a thousand hours.

Q. Would you describe the B-24, what type of aircraft is it?

A. The B-24 is a four engine bomber, classified as a heavy bomber at that time, and carried a complement of ten men. [5]

* * * * *

Q. What type of flying were you engaged in in Korea?

(Deposition of Donald E. Baker.)

A. The flying in Korea was strictly night attack bombing and strafing of convoys and locomotives.

Q. During the course of your flight experience have you ever been in aircraft which stalled?

A. Yes, I have.

Q. What is a stall, just briefly?

A. A stall is a situation in which an airplane is brought to such an altitude it loses its flying speed and normally will drop off losing altitude, either to the right or left depending.

Q. In your flight experience have you observed the characteristics of stalls in aircraft which you feel enable you to identify a stall?

A. Yes, in the heavy bomber types I have ridden in the back of the airplanes in which the pilots were practicing stalls. [7]

Q. Have you flown an aircraft in your experience as a navigator and air crewman in instrument conditions? A. Yes, I have.

Q. Have you flown an aircraft in your capacity as an air crewman in icing conditions?

A. Yes, I have.

Q. Would you state again your total flight time at the time you were on the Northwest Airlines flight on January 18 bound for the State of Washington?

A. As near as I can recall it was probably around 1400 hours.

Q. Would you state again the air base in which you boarded this Northwest Airlines plane?

(Deposition of Donald E. Baker.)

A. I believe it was called Tachikawa Air Base, a United States Air Force Base outside of Tokyo, about 18 miles from Tokyo.

Q. Do you recall the date that you boarded this aircraft?

A. That is rather hazy. I believe it was the 17th of January, but we crossed the International Date Line and I can't recall exactly what the date was.

Q. When you boarded the aircraft did you have any ticket or any document given to you from or identified as a document issued by Northwest Airlines?

A. I don't recall receiving any receipt or ticket as such.

Q. Were the personnel aboard the airplane as the crew for [8] this particular aircraft you boarded, Service personnel or could you identify them as Northwest Airlines personnel?

A. They were civilian personnel wearing Northwest Airlines insignia.

Q. Could you identify the aircraft itself as a Northwest Airlines aircraft or was it identified with a characteristic insignia of any kind?

A. No, the airplane itself bore Trans-World Airlines marking.

Q. What was the first stop in this aircraft on this flight?

A. I believe it was Shemya Air Base in Northern Pacific.

(Deposition of Donald E. Baker.)

Q. What was the purpose of the stop, do you know?

A. The purpose was routine fueling service.

Q. During the course of the flight at this point did you become acquainted with any of the crew men? A. No.

Q. Did the same crew who boarded the aircraft in Tokyo, Japan, fly it from Shemya? [9]

* * * * *

Q. During this portion of the flight after the aircraft left Anchorage did you have occasion to speak to any of [11] the crew or become acquainted with any of the crew? A. Yes.

Q. And which members of the crew did you speak to?

Mr. Koch: I object to that question as being leading.

A. Ultimately I became acquainted with all of the crew members.

Mr. Koch: I object to that as not responsive. He asked you what members of the crew you spoke to.

A. All of the crew members.

Q. Do you recall the names of any of the crew members on this portion of the flight?

A. The two pilot names I believe were Pfaffinger and Kuhn. I forget the hostess' name.

Q. What discussions did you have, if any, with the pilot and the co-pilot, or the co-pilot?

A. Discussions centered mostly in air talk, where I had flown, where they had flown, also the co-pilot

(Deposition of Donald E. Baker.)

asked me to check him out on some loran navigation problems. Since I had been instructing in Korea I did so.

Q. Who initiated the discussions between yourself and the pilot or the co-pilot?

Mr. Koch: If you know.

A. The copilot.

Q. Where did these discussions take place? [12]

A. I walked into the cabin and the copilot noticed I was a crew member and stopped and talked to me and asked me if I knew anything about loran and asked me to come up to the cabin or to the cockpit and take a look at the equipment they had on board.

Q. The copilot asked you to come forward to the pilot compartment, is that correct?

A. Yes.

Q. How much time did you spend in the pilot's compartment? A. Two-two and a half hours.

Q. Do you recall the hour at which your flight left Anchorage, Alaska, as nearly, you may state it as nearly as you can recall?

A. Late in the evening, 9:00 or 10:00 o'clock, I am not sure.

Q. Were you in a position where you could observe the weather conditions?

A. Only the conditions to the front of the aircraft.

Q. At what altitude were you flying at the time you visited the pilot's compartment after departing from Anchorage?

(Deposition of Donald E. Baker.)

A. I don't recall exactly, I think it was around 8 or 9,000 feet.

Q. What was the visibility at that altitude?

A. The visibility was clear, we were above the clouds.

Q. Had you experienced any icing conditions or any unusual [13] flight conditions after departing Anchorage? A. No, I don't believe so.

Q. What, if anything, unusual happened during this portion of the flight after leaving Anchorage enroute to Seattle?

Mr. Koch: I object to the question because it is leading.

Q. Did anything unusual happen on the leg of the flight from Anchorage enroute to Seattle?

A. Yes.

Q. Would you state what that was?

A. The oil quantity gauges indicated we were losing oil rapidly on one of the engines.

Q. Did you see the gauges? A. Yes, I did.

Q. Did you discuss this with the pilot or copilot?

A. The pilot pointed it out to the two of us.

Q. You say "to the two of us" to who are you referring? A. To the copilot and myself.

Q. Did you observe what engine he was referring to?

A. I don't recall identifying the engine from the oil gauge at the time.

Q. Could you, from your position in the cockpit tell which engine was malfunctioning?

(Deposition of Donald E. Baker.)

A. No, I could not.

Q. Did you later determine which engine was malfunctioning? [14]

A. The pilot determined the No. 1 engine was malfunctioning.

Q. Did he state to you the No. 1 engine was malfunctioning? A. Yes.

Q. Do you know which engine on aircraft No. 1 engine is? A. Yes.

Q. Which engine is it, can you relate it by position to the aircraft?

A. It is the outboard engine on the left facing forward.

Mr. Koch: Are we talking about malfunctioning or about a gauge showing a drop in oil pressure?

Q. I will ask that question. What happened to the engine we have described it as malfunctioning, what happened to No. 1 engine?

A. The oil quantity gauge indicated we were losing oil rapidly. [15]

* * * * *

Q. What, if anything, was done to engine No. 1 at this time or at that time?

A. Nothing was done because I left the cockpit at that time.

Q. Where did you go?

A. I took a flashlight and went to the cabin of the aircraft and observed the trailing edge of the wing behind No. 1 engine.

Q. Why did you do this?

(Deposition of Donald E. Baker.)

A. The pilot wanted to know if I could see any oil loss.

Q. Were you able to observe an oil loss?

A. Yes.

Q. Would you describe what you observed?

A. Oil was collecting along the trailing edge of the wing and flicking off in drops.

Q. And how were you able to observe this?

A. It was a visual observation using a flashlight from about the center of the aircraft.

Q. Approximately what time of night was this again? [16]

A. Somewhere around midnight.

Q. Did you remain in the after portions of the aircraft or did you return forward?

A. I returned to the cockpit.

Q. What took place upon your return to the cockpit, if anything?

A. During my absence the pilot had feathered the engine and was proceeding with emergency radio work notifying the ground that he had lost an engine.

Q. Did you observe that engine had been secured yourself?

A. Yes, I did.

Q. Where and when did you observe that an engine had been secured?

A. After returning to the cockpit the pilot was using an emergency light spotting his No. 1 engine to make sure it was properly feathered.

Q. Could you see it from where you were?

A. Yes.

Q. And was the propeller feathered?

(Deposition of Donald E. Baker.)

A. Yes.

Q. Did you remain in the pilot's compartment after the No. 1 engine had been secured?

A. Yes.

Q. Incidentally, we have related this to No. 1 engine, which engine did you see; in other words, which propeller did [17] you see feathered, would you relate that to the position on the aircraft?

A. The propeller that was feathered was the outboard engine on the left facing forward.

Q. Were you able, at this point, or did you observe the weather conditions after the No. 1 engine had been secured?

A. Yes, the visibility was clear. However, we were clipping off the tops of clouds about that time.

Q. Did you observe any icing conditions from your position?

A. Yes, there was some ice collecting on the pilot's windshield.

Q. Would you describe this as moderate or light or can you describe this icing as moderate or light or were you able to form an impression at all? A. It is my opinion it was light.

Mr. Koch: I object to the question as calling for the witness' opinion.

Q. Would you describe the aircraft's flight performance on three engines?

A. The pilot was maintaining altitude at about 175 miles an hour.

Q. Were you doing anything else or assisting

(Deposition of Donald E. Baker.)

him in any other way at this time or at that time?

A. Not in so far as the operation of the aircraft was concerned. [18] I did operate the loran set and informed him he was on course.

Q. What is loran?

A. Loran is a long range radio navigation device.

Q. Was the loran in this aircraft functioning properly? A. Yes.

Q. Were you the only one on the aircraft who could operate the loran?

Mr. Koch: If you know.

A. I don't know whether I was the only one.

Q. Do you know whether or not the pilot and the copilot were trained to operate the loran?

A. The copilot appeared to have a working knowledge of loran.

Q. Where did the aircraft land?

Mr. Koch: If you know.

Q. If you know.

A. We were instructed to land at Sandspit, British Columbia.

Q. Did you listen to the radio conversations after this engine was secured? A. No.

Q. How were you informed that you were instructed to land at Sandspit?

* * * * *

Q. Do you know why the aircraft landed at Sandspit? Answer [19] that yes or no.

A. No.

Q. Were you able to, how long did you remain

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in the cockpit before landing at Sandspit?

A. Until about 15 minutes before the landing approach.

Q. Did you remain in the cabin or were you in the cabin when you came in sight of Sandspit?

A. Yes, I was in the cabin at that time.

Q. Could you see the airstrip from your position?

A. Only on the turn on to the final approach.

Q. Would you describe, were you able to observe the visibility? A. Visibility was poor.

Mr. Koch: I object because that isn't a responsive answer to the question.

Q. That question should be answered yes or no, I asked you were you able to observe the visibility?

A. Yes.

Q. What was the visibility at that time?

A. Poor.

Q. Can you estimate the visibility in miles?

A. No.

Q. Can you estimate how far away you were from the airstrip in your turn to the final approach? A. No. [20]

* * * * *

Q. Just to clarify, when did you leave the pilot's compartment again Mr. Baker?

A. When we started descent to approach Sandspit.

Q. Where did you go then?

A. To my assigned seat in the cabin.

Q. And it was from this position, is it true then,

(Deposition of Donald E. Baker.)

it is from this position you observed the final approach to the airport?

A. I observed the turn on to the final approach to the airport.

Q. Was the landing effected at that point?

Mr. Koch: That is leading.

Q. What happened next?

A. We proceeded to shoot the landing, it appeared to me we were landing high and fast, and that the airplane floated and we passed over the lights at the end of the runway and didn't touch down for a period of time after that. We rolled on the runway for perhaps five to ten seconds then the pilot applied power and attempted to take off again and in fact did get the airplane back in the air. [21] * * * * *

Q. Did you know where the aircraft was at the time it touched down and at the time the pilot took the wave off? A. No.

Q. Did you know the airstrip to which the aircraft was [22] approaching or had made its approach, did you know it by name?

A. No. Let me take that back, I have seen the radio guide book for the airport in which we were landing and had seen a map.

* * * * *

Q. When you left the pilot's compartment to return to your seat in the cabin as you have described it, did you know where the aircraft was destined or bound to, do you know where the aircraft was heading at that time?

(Deposition of Donald E. Baker.)

A. The pilot informed me we were going to land at Sandspit.

Q. Did the airplane then crash in the water or land in the [23] water? A. Yes, it did.

Q. Would you describe what happened after the airplane landed in the water?

A. There was total darkness, all lights failed. Having seen a map of the airport I knew we had to be in the water so I stood up on my seat and grabbed a life vest and handed out life vests to people around me. I couldn't see them, I could feel the people and shoved the life vests in their hands and told them what it was and then I made exit from the airplane on an escape hatch on the left side of the airplane.

Q. Where was the escape hatch which you made your exit from located?

A. It was located on the left-hand side of the aircraft facing forward over approximately the center of the wing.

Q. How long did the aircraft remain afloat—strike that question—did the airplane float or did it fill with water immediately?

A. The airplane started to settle in the water immediately.

A. Were you able to observe how many of the passengers made their way from the aircraft?

A. As nearly—

Mr. Koch: Either you were or weren't able to.

Q. Yes, or no. [24]

A. Will you restate the question?

(Deposition of Donald E. Baker.)

Q. Were you able to ascertain approximately how many of the passengers were able to escape from the airplane?

Mr. Koch: I don't believe that is the same question.

(Reporter reads last question back.)

A. Yes.

Q. Can you state how many left the aircraft with you at this time or at that time?

A. Around 35.

Q. On leaving the aircraft where did you personally go?

A. I first went to the left wing and as the aircraft settled in the water I dove in the water and swarm to the nose and climbed up on the top of the fuselage so I ended up on the top of the fuselage to the forward part of the airplane.

Q. Were there any other portions of the aircraft still above the water?

A. The right wing tip was still above water at that particular time, the entire top side of the aircraft was above the water. Eventually it sunk to a point where the fuselage was under water and the right wing tip and rudder were the only things out of the water.

Q. Did you have a Mae West? [25]

A. Yes, I did.

Q. Did you see any other people wearing life vests? A. No, I did not.

Q. What type of life vest did you have?

A. It was a regular life vest that we would call

(Deposition of Donald E. Baker.)

a Mae West; however, it was of a type that I had never used or seen before and it was rather difficult to put on.

* * * * *

Q. Have you had occasion in your military flying experience, to wear a Mae West? A. Yes.

Q. Have you worn different types of Mae Wests before? A. Yes.

Q. Was this like anything that you had ever worn before? A. No.

Q. Did you have any particular difficulty with this particular vest that you took from the aircraft with you? A. Yes.

Q. Would you state what difficulty you had?

A. It was difficult to put it on because the material was of lighter quality than the Mae West that I was accustomed to, otherwise it was much more flexible than the type I [26] was accustomed to.

Q. Did you actually put the vest on?

A. Yes, I did.

Q. How was it inflated or did you inflate it?

A. I inflated it.

Q. How did you inflate it?

A. By pulling a ripcord.

Q. Did it have an automatic inflation device?

A. Yes.

Q. This did function? A. Yes.

Q. Were you given any instructions in the course of your flight by anyone on the aircraft leading to the use and type of life vest that were

(Deposition of Donald E. Baker.)

installed in the aircraft? A. No.

Q. Were you given any literature by anyone in the aircraft or any of the crew members describing or relating to the use of the life vests which were installed in the aircraft? A. Yes.

Q. Did you read that literature?

A. Yes.

Q. Was the vest which you wore the type which was described on the literature that was given to you? A. I can't answer that question. [27]

Q. Do you recall the type of Mae West or life vest which was described in the literature which you have just referred to?

A. It described a Mae West, just a general type Mae West, no particular type. When we speak of Mae West we are talking about a general category of life vests.

Q. Do you recall whether the instructions or can you state whether or not the instructions in this literature that you had was applicable to the vest which you subsequently used?

A. I don't know.

Q. May I ask where did you obtain the literature to which you have just referred?

A. Literature was in each seat package.

Q. This was not given to you personally when you boarded the aircraft or was it given to you personally when you boarded the aircraft?

A. No, it was in a flight folder at the seat.

Q. Were you instructed by anyone aboard the aircraft to refer to this literature? [28]

* * * * *

(Deposition of Donald E. Baker.)

Q. Can you answer that yes or no?

A. Yes.

Q. Is your answer yes? A. Yes.

Q. Who was that? A. The hostess.

Q. Returning to your situation after you evacuated the aircraft, do you know whether or not there were any life rafts aboard the aircraft?

A. Yes.

Q. Were there or were there not?

A. Yes, there were.

Q. What leads you to conclude that there were life rafts aboard the aircraft.

* * * * *

A. I saw one life raft in the forward compartment.

Q. Was this raft ever removed from the aircraft? A. No.

Q. Do you know whether an attempt was made to remove it from the aircraft? A. Yes. [29]

Q. And when was that attempt made?

A. An attempt was made after the crash.

Q. And who made the attempt or do you know who made the attempt first? A. The copilot.

Q. The answer should be yes or no, do you know who made the attempt? A. Yes.

Q. Who was that? A. The copilot.

Q. Did you assist him or were you near him at the time he attempted to remove it from the aircraft?

A. No, I didn't assist him, yes, I was near him.

Q. What did he do?

(Deposition of Donald E. Baker.)

A. The copilot went back inside the airplane after the fuselage was under water and attempted to dislodge the life raft.

Q. What were the results of his efforts?

A. He couldn't get the life raft out.

Q. Did you talk to the pilot after the plane, after you evacuated the aircraft? A. Yes.

Q. And would you relate your conversations with the pilot, the best you can recall?

A. I told the pilot that I felt that there was a possibility [30] that some of us wouldn't survive and I asked him directly if he could tell me what happened to cause the accident?

Q. What did he say?

A. He appeared to be very incoherent and the most I could get out of him was that, something about going to hit a ditch. That is about all I could get out of him.

Q. Were you able to talk to the copilot at any length after you talked to the pilot? A. Yes.

Q. What were your conversations with the copilot or what did you talk about?

A. Our talk was directed towards plans of trying to get that life raft out, if possible.

Q. Were your discussions confined to this topic?

A. Yes.

Q. Did you remain on the fuselage the rest of the time until you were rescued or did you leave the fuselage? A. I left the fuselage.

Q. Did you have to leave the fuselage?

A. Yes.

(Deposition of Donald E. Baker.)

Q. Why was that?

A. The top of the fuselage was under water and not tenable at the time.

Q. Where did you go?

A. I swam to the right wing tip. [31]

Q. Why did you swim to the right wing tip?

A. The right wing tip was still out of water.

Q. Were there any other people there?

A. Yes, there were.

Q. Can you estimate or are you able to estimate the time which elapsed after you left the aircraft until the time you reached the right wing tip?

A. No, I can't.

Q. How many people were out on the right wing tip when you went out there?

A. I don't know how many there were.

Q. Are you able to state approximately, could you give me any idea of the number of people who were there?

A. After I reached there there were approximately 15.

Q. Were there any other survivors or any other passengers of the aircraft that were on other portions of the aircraft at that time?

A. Some were still at the back part of the fuselage holding on to the vertical stabilizer.

Q. Could you see these people? A. Yes.

Q. What was the visibility about this time? Strike that,—Do you recall the visibility of the weather at the time that you reached the right

(Deposition of Donald E. Baker.)

wing tip of the aircraft, you can answer that yes or no. [32] A. Yes.

Q. Would you state what the visibility was?

A. At first we had intermittent snow with very poor visibility and it stopped snowing and the moon came out and we could see.

Q. Could you see where you were, could you see land or could you see any other identifiable objects? A. Yes.

Q. What could you see?

A. We could observe obstruction lights and land.

Q. Could you or could you not see the airport from that position?

A. We could see lights but I can't identify it as the airport.

Q. Now would you just in a narrative state what happened to you from that point until you were rescued?

A. Well, our main interest was hanging on to the wing. We would occasionally get washed away by the waves, but the visibility was getting better and we could find our way back to the wing tip, those people who were able to, physically able to manage it. [33]

* * * * *

Q. How were you able to leave the airplane?

A. We were dragged to shore by a row boat with an outboard motor on it.

Q. You referred to "we."

A. The other survivors and myself, seven in all.

Q. Do you know where this boat came from?

(Deposition of Donald E. Baker.)

A. No.

Q. How many men were in the boat?

A. Two. [34]

* * * * *

Q. Where were you taken in this boat that picked you up?

A. We were dragged to the shore.

Q. Is it your statement you were unable to get into the boat?

A. That is right, there wasn't room for seven of us in the boat.

Q. Were any of the seven of you placed in the boat?

A. No one was completely put in the boat. I was dragged across the side of the boat because I had slipped and started to go under water.

Q. Do you know where the boat landed?

A. No, I don't.

Q. The boat did land I take it?

A. I don't know the exact location, yes, I did land on the shore line.

Q. What happened to you when you reached shore, where did you go when you reached shore?

A. With the help of people along the shore we were walked approximately 100 yards to motor vehicles and taken to a village, I presume it was Sandspit. [35]

Q. Did you receive attention there?

A. Yes, we did.

Q. Now you were able to walk when you left the water, is that right, or were you able to walk?

(Deposition of Donald E. Baker.)

A. We were forced to walk, there were only two people there and they couldn't carry seven of us. We were helped to walk, we couldn't have done it by ourself. [36]

* * * * *

Q. Starting from scratch, what was your condition when you were taken to the village by the people on the boat and people that assisted them on the shore line?

A. I was frozen up pretty badly. I could feel nothing in my legs or my hands or my arms.

Q. You were conscious?

A. I was conscious, yes. However, I needed assistance to [37] walk and I could not remove any of my clothing by myself, all of my clothing had to be removed for me.

Q. By the way, were you fully clothed in the water or were you partially disrobed when you entered the water?

A. I was in complete military uniform except for hat, overcoat and shoes.

Q. What medical treatment did you receive at the village or wherever you were taken after you were removed from the water?

A. Our formal medical treatment did not take place until approximately six hours after we were brought to the village. The doctor had been brought in for the purpose of observing us and doing what was needed for us.

Q. Did you receive medical treatment?

A. Yes.

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Q. What medical treatment did you receive?

A. As nearly as I can recall I received rub downs, some type of tablet to enable me to sleep. I believe that was about all except for being kept warmly wrapped with hot water bottles.

Q. Were you in any pain at any time while you were in the village? A. Yes.

Q. Would you describe the pain you experienced?

A. Apparently I had wrenched my shoulder at some time during [38] the experience and also my feet were very sore after they had thawed out from having walked across rocks in my bare feet.

Q. Do you recall how long you remained in the village approximately?

A. I believe that was already asked, 20 hours.

* * * * *

December 12, 1956

Cross Examination

Q. (By Mr. Koch): You are Donald Eugene Baker? A. Yes.

Q. Mr. Baker, this is the cross examination relating to the direct testimony that you gave last Saturday, December 8th, in this cause. The cross examination of which was deferred until today at this time. A. Yes.

Q. I might say, Mr. Baker, that the purpose of this examination is largely to clear up what few inconsistencies there appears to be between the testimony you gave Saturday and the testimony that

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you gave in previous statements and depositions in the same case. I assume [2] that I am doing a service for you and for all the parties in this case because it is pretty hard to keep these details in mind for so many years and so I am not doing anything more than helping you, if I can, to recall some of the circumstances where the testimony does vary a little. On direct examination, and when I say direct examination I am talking about last Saturday, you testified that when you boarded the aircraft that you did not recall having received any ticket or document issued by Northwest Airlines. You also testified that orders were cut directing you to proceed to Seattle. Do I understand then that you were provided with a military order? A. Yes.

Q. What did the orders contain?

A. The orders normally contain the name, rank, serial number, your destination, your current station, the purpose of the orders and that in many cases will specify the type of transportation to be used.

Q. Now in this case what did it show as your present station?

A. At that time, as near as I can recall those orders had me stationed at the air base at Tachikawa on temporary duty from my regularly assigned outfit in Korea.

Q. Well, in that respect were those orders correct? [3] A. Yes, as near as I can recall.

Q. And what do the orders show as your destination?

(Deposition of Donald E. Baker.)

A. The destination, as nearly as I can recall, a portion of the order stated I was to be returned to the Zone of Interior for the purpose of emergency leave by military air transport and that is about all I can recall of them.

Q. By the Zone of Interior, does that mean the Continental United States?

A. That is correct.

Q. And by military air transport, what do you understand that to refer to?

A. That is, as I understood it, any available military transport or contract carrier.

Q. And is that transportation arranged by some designated officer at your Base or American Base?

A. Yes, it was.

Q. In this case was it the transportation officer?

A. At that base at Tachikawa they had a regular unit for processing personnel from foreign zone to zone of interior and all personnel, regardless of rank, passed that processing unit. Exactly what it was called I don't recall.

Q. That processing unit arranged for your transportation from that base to the Continental United States? [4]

A. Yes.

Q. Did your orders, or did the processing unit advise you how you would get from—specifically what means of transportation would be provided you?

A. Only that it would be air transportation.

Q. It would be air transportation?

A. That is all I knew at that time.

(Deposition of Donald E. Baker.)

Q. Did the orders tell you the place or point of departure and the time of departure?

A. The orders did not specify the place or the time. As I recall due to the nature of the emergency leave they specified first available transportation, air transportation.

Q. From Haneda?

A. At that time it was from Tachikawa to the zone of the interior.

Q. Were there flights leaving from Tachikawa to the zone of the interior?

A. That is a point that in going over, picking up my testimony Saturday, the flights were originating from Haneda. Most of my flying has been in and out of Tachikawa, that is how I got confused on that point.

Q. Then did your orders indicate your air transportation would originate at Haneda back to the zone of interior?

A. That I don't recall, whether it was specified Haneda or not. [5]

Q. Would your orders normally so specify?

A. Not normally. I have had occasion where I have been directed to proceed to a port of embarkation then maybe I would leave from another place in an approximate area, but not from the port of embarkation.

Q. Did the orders from the processing unit at Tachikawa serve as your ticket on to the plane back to the United States?

A. Yes, as near as I can recall.

(Deposition of Donald E. Baker.)

Q. Did you hand a copy of the orders to the civilian personnel on the airplane or at the airport?

A. I can't answer that question positively. I know I didn't hand a copy of the orders to anybody on board the aircraft; however, we did check in to a booth at the airfield and I don't recall whether I gave a copy of the orders, or showed my orders and at that time I was already listed on a manifest of some sort. I do recall them checking my name off as being ready to go. [6]

* * * * *

Q. Now on direct examination you testified that just prior to the time the plane landed in the water off Sandspit that it felt to you as though the plane had stalled, then went into the water and shortly before that you had explained briefly what a stall was, and that you were familiar with stalls and characteristics of stalls from your flying experience in the military service, do you recall that? [8]

A. Yes.

Q. Now in the deposition taken by the Civil Aeronautics Board at the St. Louis Depot March 19, 1952, relating to this same air disaster, you were asked about your experience with respect to stalls and aircrafts such as a C-54 or DC-4 which was involved in this accident. Do you recall saying, at that time, that you had never had any experience, that you had never experienced a stall in a C-54 even though you had been through many stalls in a B-24 bomber? A. Yes.

Q. And you further recall testifying that the

(Deposition of Donald E. Baker.)

flying characteristics of a C-54 and a B-24 are quite different? A. Yes.

Q. And that you further testified that your impression of a stall with respect to this flight was based on your experience of the similar feelings you had when you were in a larger type of plane, a B-24?

A. Well, it is not a larger type of plane. I don't believe it is much bigger than the C-54 but the answer is yes to that question.

Q. And further when you were testifying Saturday on direct examination on this subject you testified that you could feel and hear quite a vibration from the nose sector and it was then that [9] it felt to you as though there had been a stall, but the expression you used was quite a vibration, and I noted in describing this same situation in this St. Louis deposition you referred to this sensation as just a vibration, your words were "it seemed to me to be a meshing type of vibration, it was not a violent type of stall, that much I know." Do you recall that language? A. Yes.

Q. And it is true, is it not, this vibration was just quite momentary?

A. Could you elaborate on the period of time you mean as "momentary"? We probably weren't air-borne more than 15 or 20 seconds from the time we left the runway. The vibration from the nose, I would say, had a three or four second duration, as near as I can recall. I believe I further described

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that vibration as being similar to a broken Shimmy damper.

Q. Well, I was referring to the question with respect to whether it was a continued vibration where you said "whether that vibration continued on I cannot answer because I did hear the hydraulic pumps and it is possible that vibration just melted right in with the other things that were happening, the pilot trying to get the gear up, so I can't state positively it continued for any length of time." [10] That was the part I had reference to.

A. Everything was happening so fast there may have been a few seconds there but that part of it is a definite fact in my own mind, there was the vibration from the nose.

Q. On direct examination you testified Saturday to a four or five hour delay in Shemya due to what had been, you had been informed was generator trouble, do you recall that? A. Yes.

Q. In this St. Louis deposition and again I make reference to this because it is the only other background information I have on the matter, and it was so much closer to the time of this accident, your testimony was as follows: "We changed the generator at Shemya Air Base but it appeared to be a minor thing and naturally only took two and a half hours." Do you recall that?

A. I don't recall the exact time on that.

Q. Well, if that was your testimony at that time——

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A. I would say that was a much nearer estimate than my testimony on Saturday.

Q. And at that time you also said that you didn't recall which generator was affected, do you recall that, not that you said which one was affected Saturday but I am just bringing that out too. [11]

A. I don't recall pointing out which engine it was. I knew there was a generator change.

Q. But not which particular engine was involved?

A. That question I don't believe was pointed out Saturday.

Q. No, it wasn't. Saturday Mr. Riley asked you whether you recalled the hour at which your flight left Anchorage, Alaska, and you testified that it was late in the evening, 9:00 or 10:00 o'clock, and you were not sure and in your St. Louis deposition on the same point your testimony was as follows: "We took off from Anchorage around 6:30 p.m.," that is the only part of the testimony that refers to that.

A. The 6:30 p.m., time I am sure is the correct time there. We had a two hour time differential between there and the States.

Q. It was 6:30 p.m., Anchorage time?

A. As I recall it was about that time. I got confused on that several times because of the time change.

Q. Now I want to refer to Saturday's testimony referring to, I mean dealing with icing, the collec-

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tion of ice on the pilot's windshield and on that subject you testified Saturday that you had observed some ice collecting on the pilot's windshield and you described that ice accumulation as light. In your St. Louis deposition your testimony was substantially the same but you went on to [12] point out, "That the pilot felt that there was no particular harm in having lost that engine, referring to the engine that had been feathered; as a matter of fact shortly after we lost the engine he had accumulated a little bit of ice on his forward cockpit windows and he decided he would climb a little bit to see if he could get out of the region of ice, I forget the altitude. I know he did climb approximately a thousand feet or more to get out of this icy condition. The aircraft climbed very well on three engines." Do you recall that testimony? A. Yes.

Q. And isn't it true that when the elevation was increased a thousand feet the icing disappeared? A. That is right. [13]

* * * * *

Q. Saturday you testified when Mr. Riley asked you whether you were able to observe visibility as you approached the Sandspit landing that the visibility at that time was poor and you could not estimate the visibility in miles, do you recall that testimony? A. Yes.

Q. During the St. Louis deposition we asked about the visibility and you testified that from the one or two glances which you had of lights it ap-

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peared to be hazy, that you were able to see lights, [14] that upon landing there was no fog. Do you recall that testimony? A. Yes, I do.

Q. Well, then when you referred to the visibility as poor, does that relate in part to steam inside the windows, or where you sat, rather than what the conditions might be from where those charged with the operation of the plane observed conditions?

A. When I spoke of visibility I meant the outside visibility, not so much my visibility from the seat. I could see lights but it was hazy, does that answer your question?

Q. Yes, in other words, referring to seeing the lights in the haze and there was no foggy conditions described, at least what you had in mind when you say poor?

A. That is right, it wasn't an ideal condition.

Q. Saturday, in relating the final approach to the airport and the attempted landing you testified on direct examination that it appeared to you that the plane was landing high and fast and that the plane floated and didn't touch down for a period of time after coming to the first part of the runway, then the plane ran on the runway for five to ten seconds before the attempted takeoff was made. In your previous deposition on this subject I notice that you testified that you didn't know what the airspeed was on the final approach and [15] that you didn't know the plane's position relative to the runway, though you did see lights flash by. At that time you testified that you thought

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the plane was coming in pretty high but there was no testimony about floating. Now how about that prior testimony, I am referring to its accuracy compared to the testimony now about fast and floating which wasn't in your previous testimony?

A. I believe the floating portion of it is correct. I felt as he was killing his speed coming in high he was floating somewhat as large aircraft sometimes do on landing when you are trying to kill your speed rapidly.

Q. Well, with that explanation of floating do you now recall that you didn't testify or did testify you didn't know anything about the location on the runway or speed previously?

A. Do you recall how that question was phrased to me at that time?

Q. Yes, I will be glad to read it to you.

Mr. Riley: Would you read the statement where he said he knew nothing about the speed and position, I didn't understand the previous statement as stated.

Mr. Koch: Well, there isn't a question, the question was, "Shall I go on," then he just went on relating, this is all just a general narrative.

Q. I am going to read what he said—"As we [16] approached Sandspit the pilot notified me he was starting his descent and I proceeded to my seat in the cabin in the airplane. I was sitting in the third row of seats on the left-hand side of the aisle. The descent appeared to be normal. The pilot choose a right-hand descending pattern, there

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was a little bit of turbulence, I couldn't see whether it was clouds or what was causing it during the descent, but nothing unusual appeared. The descent was slow and took approximately 15 minutes. From my seat I could not tell exactly what the weather was at Sandspit but I do remember the pilot's comment in saying Sandspit was clear with occasional snow flurries. These reports came through radio communication with ground stations. As the airplane came in for the landing from the the movement of the airplane it felt to me as if he was coming in pretty high and attempted to drop in. The touch came down before he had completed his Flurr out and was pretty rough. I don't know what the air speed was on the final approach, I have no idea what our position was relative to the runway." Is that true?

A. Yes, that is true.

Q. A word more on that same point, do you recall January 20, 1952, that you gave a written statement relating to this accident at the McChord Air Force Base and at that time in your statement you made one statement as follows: "I do [17] not know the air speed on the final approach, the relative position of the aircraft to the runway at touchdown nor the air speed and altitude at time of stall over the water." Do you recall that?

A. Yes.

Q. Saturday when you referred to hearing what you thought to be the hydraulic gear, is that the same thing as the hydraulic pump? A. Yes.

(Deposition of Donald E. Baker.)

Q. Saturday when you were describing the situation immediately after the plane got into the water, Mr. Riley asked you how long the aircraft remained afloat—I think he rephrased the question to say did the airplane float or did it fill with water immediately, and you answered that the airplane started to settle in the water immediately. In connection with that I want to call your attention, your statement in the deposition in St. Louis where you said, “That the airplane gradually settled in the water.” Do you want me to read the testimony to refresh your recollection? A. No.

Q. Would you say it settled gradually?

A. Yes, it settled gradually but it began to settle immediately, that was the thing I perhaps didn't make clear Saturday. [18]

Q. Am I right in concluding from the way you described how the nose was dipped down a little bit how the various parts of the plane came to rest, that it was in extremely shallow water?

A. Not extremely shallow water, you couldn't wade in it. I don't know exactly how deep it was, the residents at Sandspit said it was about 20 feet at that point.

Q. But am I right, do I understand you correctly that parts of the plane were touching bottom, the plane was on the bottom and parts of it stood up above the surface of the water like the wing that you stood on?

A. That is true, we found out at a later time, at least we were told.

(Deposition of Donald E. Baker.)

Q. You didn't know it then?

A. I didn't know it then. We didn't know whether it was going to go all the way under.

Q. Now Saturday there was a rather extended discussion of the life vests which I would like to go into a little bit. Isn't it true, Mr. Baker, that when the plane landed or crashed into the water off Sandspit and the lights went out that you immediately passed out life vests to a number of passengers in the plane, that you pulled them out of the seats ahead of you and seats behind you and the seats where you were and gave them to other people? [19]

A. Yes, I pulled them out of a curtained compartment above the seat.

Q. Not just on your own seat but other seats too?

A. What I could reach from my seat, I reached forward and backward.

Q. And you gave them out to a number of people? A. Yes, that is true.

Q. And you also told other people where the vests were located so they could get them out themselves in case they didn't know?

A. Well, I tried to tell people, it was rather noisy.

Q. And isn't it also true, Mr. Baker, that you saw passengers outside the plane with Mac West jackets on. A. No, I don't recall it.

Q. Let me see if I can refresh your memory. This is a question that was asked you in the St.

(Deposition of Donald E. Baker.)

Louis deposition, "You previously commented that you gave some Mae Wests to several passengers during the time prior to your being rescued, do you recall whether any of these persons may have donned these Mae Wests?" Answer: "That I cannot state. I do know there were one or two who came out of the airplane with Mae Wests. In talking to them afterwards when they stepped out and hadn't put them on inside fell into the water and they lost them." Do you recall that testimony? [20]

A. Yes, I recall that.

Q. Some other people did have the vests outside the plane that you didn't see, that had them on?

A. That is true. I can't say definitely that other people had them. One or two people mentioned having lost them, whether others actually had them I can't say.

Q. You said, "I do not know, there were one or two who came out of the plane with Mae Wests."

A. But not with Mae Wests on.

Q. You don't know whether they had them on or not?

A. They didn't apparently at the time I talked to them. Could I make a point here concerning this—I doubt if any of the passengers besides myself would have had any reason to believe they were in water when we crashed. That probably explains why probably quite a few of them didn't come out with Mae Wests.

Q. Now isn't it true, Mr. Baker, that you testified previously that this was a new type of Mae

(Deposition of Donald E. Baker.)

West life jacket or life vest? A. Yes.

Q. When you testified that you had trouble figuring out how this particular one worked, is that largely due to the fact it was pitch dark and you were having a little trouble knowing what part of it you were holding on to, I mean it would be hard? [21]

A. Yes, that is true; however, the Mae West which I was accustomed to I could put on in the dark without any trouble at all.

Q. But if this had been light so you could see what you were doing you wouldn't have had any trouble putting this one on, would you?

A. Probably not.

Q. As a matter of fact, you got the vest on wrong, you got your arm through the head hole or something like that, didn't you? A. Yes.

Q. And the vest worked all right but I mean it wasn't on just the way it should have been?

A. That is true.

Q. It was a CO2 type, not the Kapok type?

A. No, it was a CO2.

Q. Are the newer ones that chemical type?

A. Well, all of the ones I had ever used were CO2.

Q. Do you remember Saturday, Mr. Baker, when you testified that the literature which the airline gave you on emergency procedures, donning the life rafts and so forth, was put on each seat, that is where you found it, on each seat?

A. Yes, I believe that is what I said.

(Deposition of Donald E. Baker.)

Q. I noticed in the St. Louis deposition you [22] testified that the booklet describing these emergency procedures were handed to each passenger, it is sort of a minor point.

A. I would say the St. Louis testimony is correct on that point.

Q. Just one other point, you mentioned that you came back from Sandspit to McChord Field on the Northwest Craft, you are talking about a Northwest Airlines plane? A. Yes.

Mr. Koch: I think that concludes my cross examination, do you have any redirect? [23]

* * * * *

[Endorsed]: Filed March 11, 1957.

[Title of District Court and Causes.]

DEPOSITION OF RICHARD PONTIUS FIELDS

taken on behalf of the defendant, at Suite 530, 548 South Spring Street, in the City of Los Angeles, California, commencing at 2:30 o'clock p.m., on the 4th day of March, 1957, before John J. Rabasa, a notary public in and for the County of Los Angeles, State of California, pursuant to the annexed Notice.

Appearances: For the Plaintiff: None. For the Defendant: Messrs. Karr, Tuttle & Campbell; by Messrs. Crider, Tilson & Ruppe, by James Edward Kelly, Esq., 548 South Spring Street, Los Angeles, California. [2]

RICHARD PONTIUS FIELDS

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kelly): Will you state your full name, please?

A. Richard Pontius Fields.

Q. How do you spell the middle name?

A. P-o-n-t-i-u-s.

Q. What is your present address?

A. 6414 North Barela Avenue, Temple City, California.

Q. Mr. Fields, do you have any present intention of going to the State of Washington within the next ten days? A. I do not.

Q. Your permanent residence is here in Temple City, Los Angeles County, California?

A. That is correct.

Q. Where are you employed, sir?

A. The Southern Pacific Company in Santa Ana.

Q. Santa Ana, California?

A. Santa Ana, California.

Q. What is the nature of your work there?

A. I am in the freight traffic department. [3]

Q. Mr. Fields, I don't know whether you have had any previous experience in the past by way of a deposition, but let me point out to you just a few things regarding this procedure. [4]

* * * * *

(Deposition of Richard Pontius Fields.)

Mr. Fields, how old are you at the present time?

A. Twenty-eight.

Q. This deposition today concerns an accident and incident that happened back in January of 1952. Do you recall an incident involving an airplane at approximately that date? A. I do.

Q. What was your occupation just prior to this accident in January, 1952?

A. I was in the United States Army.

Q. What rating or rank did you have in the Army at this time?

A. Sergeant First Class.

Q. Do you know the exact date when the accident occurred? A. January 19, 1952.

Q. Prior to the accident you had been a passenger in the plane? A. That is correct.

Q. Where had you started the trip or flight from that eventually ended up where the accident occurred?

A. It commenced in Tokyo, Japan.

Q. I assume that had been a day or two previously, was it?

A. That is correct. [6]

Q. Where was the last stop that was made before the accident or rather the last landing of the plane, do you recall that?

A. Anchorage, Alaska.

Q. What is the first thing that occurred after leaving Anchorage, Alaska, that indicated there was some difficulty with the plane?

A. The feathering of the No. 1 engine.

(Deposition of Richard Pontius Fields.)

Q. That would have been approximately how long after you left Anchorage, Alaska, that is, how much time elapsed after you left Anchorage, Alaska?

A. Between two and three hours after departure at Anchorage.

Q. How did you know that there was trouble with an engine on the plane?

A. Because a crew member examined the No. 1 engine by flashing a flashlight through the porthole on the engine.

Q. What did you see at that time?

A. The feathering or stopping of the outside port engine.

Q. What was the next thing that was done after this indication that one of the engines was in difficulty or stopped or was feathering or whatever it had been doing?

A. The flight proceeded for approximately an hour and a half before indication of landing was [7] made visible by a descent and also the flashing of "Fasten seat belts" and "No smoking" sign in the forward part of the passenger compartment.

Q. Do you recall approximately how many passengers there were on the plane?

A. There were approximately 40 passengers aboard the plane.

Q. What did they have in the way of a crew as far as you could tell?

A. They had a pilot, a co-pilot and a stewardess.

Q. Is there anything that you recall in particular that the stewardess did after you left Anchor-

(Deposition of Richard Pontius Fields.)

age, up to the time of the accident? A. No.

Q. Had you been on this same plane from the time you left Tokyo, Japan, up until the time of the accident? A. That is correct.

Q. You didn't change planes anywhere enroute?

A. It was the same plane.

Q. When the flight left Tokyo was there any procedure or type of instructions that were given?

A. Pertaining to what, sir?

Q. Pertaining to any part of the passengers' duty or advising them or instructing them in the event of any unforeseen conditions or circumstances arising?

A. There was a booklet on the seat at Tokyo [8] that gave instructions on how to prepare yourself for ditching or emergency landings in the water, also how to put on your safety paraphernalia or life jacket, also the location of the life jackets in the particular aircraft that we were aboard.

Q. You say there was one of these booklets on each seat; is that correct?

A. Yes. There was a booklet on each passenger's seat.

Q. Did you read the booklet after the plane left Tokyo?

A. I read the booklet while the plane was at Tokyo.

Q. I believe you said that it was not until about an hour and a half, something like that, after the

(Deposition of Richard Pontius Fields.)

first notice of engine trouble the plane started to descend for a landing, did it?

A. That is correct.

Q. You could tell that because of the decline of the plane and also the flashing of the sign to fasten seat belts and no smoking; is that correct?

A. That is correct.

Q. What was the general condition of the weather, as far as you could tell, when the landing started, were you able to determine by looking out or any other method as to the nature of the weather at that time?

A. The visibility from the aircraft from my [9] particular seat was not too good because of a frosted condition on the portholes.

Q. You couldn't tell then at that time whether it was raining or snowing outside?

A. I could not.

Q. I assume, also, that you couldn't tell very well the nature or the degree of the temperature outside of the plane at that time?

A. That is correct.

Q. Anyway, with the frosted portholes it indicated that it was probably pretty cold outside; is that right? A. Yes.

Q. Now, can you describe to us in your own words, as best you can, just what happened when you landed, when the plane finally landed?

A. When the plane made its approach towards the runway the first touch down was rather hard in comparison to the other landings experienced

(Deposition of Richard Pontius Fields.)

on this flight. The plane was air borne immediately after touching down. It again touched the ground, this time more violently than the previous time which occurred within seconds before. There was then a definite indication that the plane was going to try another approach for the landing, the reason being full power was applied and a definite upswing indicating takeoff was evident through experience of other flights. [10]

Q. Then what happened?

A. We were air borne for approximately two minutes when a left bank was felt and shortly afterwards in the course of seconds an impact to the plane of severe violence was felt.

Q. By the way, at the time that this landing was first started, and after you observed that one of the engines was feathering or stopped, what was the condition of the visibility, as far as daylight or darkness?

A. It was dark.

Q. Fully dark? A. Yes.

Q. Do you have any idea of the approximate time?

A. Late p.m. or early a.m.

Q. Somewhere around midnight?

A. Somewhere in the vicinity of midnight.

Q. I believe you said there was a left bank and then there was a violent crash; is that right?

A. That is correct.

Q. What happened then?

A. The impact was on the left wing dipping or being caught in the water. The plane made a for-

(Deposition of Richard Pontius Fields.)

ward lunge to the right pulling my seat loose from the fuselage.

Q. Were there any lights inside the plane as this landing was being attempted?

A. There were the normal lights that are on in a landing, yes. [11]

Q. They were burning?

A. Yes, that is correct.

Q. What happened then when this crash occurred?

A. When the crash occurred, why, all the lights went out.

Q. So there was absolutely no lighting inside the plane at all?

A. It was completely dark.

Q. What happened next, as far as you can recall, after the crash and the lights going out?

A. Confusion; people trying to find their way out of the airplane, a seepage of water on the floor of the fuselage and then the emergency hatches being opened.

Q. Do you know who opened them?

A. I do not.

Q. Did you see any of the crew members after the crash?

A. Yes. One of the crew members opened the compartment forward of the passenger compartment and asked if there were any persons injured.

Q. Did anyone say anything in response to that?

A. There was confusion and I did not determine if anybody answered him directly or not.

(Deposition of Richard Pontius Fields.)

Q. You don't recall hearing anybody say that they were injured at that time? A. No. [12]

Q. What else did the crew member do?

A. He had a flashlight and had shone it in the fuselage to determine, I believe, the damage or to make an inspection for himself to see if anybody had been injured in the crash.

Q. Did he shine the flashlight around the inside of the fuselage? A. Yes, he did.

Q. What did you do then with regards to your own efforts?

A. I took two of the life preservers from the designated area and gave one to my brother Charles and kept one myself.

Q. Where did you find the life preservers?

A. Above the seats as indicated in the pamphlet that I read at Tokyo.

Q. Were there any markings on the cases or containers or whatever the life preservers were held in?

A. The life preservers were in permanent containers over the seats and the containers had markings on them indicating that they contained life preservers.

Q. Both you and your brother Charles obtained a life preserver; is that correct?

A. That is correct.

Q. After you got your life preserver on, [13] Mr. Fields, what did you do?

A. I did not put my life preserver on.

Q. What did you do with it?

(Deposition of Richard Pontius Fields.)

A. I held it in my hand as I went out of the emergency hatch and upon reaching the outside I stepped off the back of the starboard wing and went under water, and at that time I lost my life preserver.

Q. Then what did you do? First, let me ask you this: When you went under water, how deep into the water did you get, to your waist, your shoulders or over your head?

A. I went under water above my head; how deep, I cannot determine.

Q. In other words, you were totally submerged?

A. That is correct.

Q. At that time you lost your life preserver?

A. At that time I lost my life preserver in trying to get above water, get my head above water.

Q. Then what did you do when you finally got your head above water?

A. I swam back to the wing and got up on the wing and crawled to the point or outside of the wing to accompany my brother.

Q. Which wing would that have been?

A. On the starboard or right wing.

Q. About how many of you finally ended up on the starboard wing? [14]

A. The ultimate number of seven survivals were all taken from the starboard wing.

Q. In other words, all those that were fortunate to survive were all on the starboard wing?

A. That is correct.

(Deposition of Richard Pontius Fields.)

Q. How long were you on the starboard wing, as best you can estimate?

A. Approximately an hour and a half total.

Q. Then what happened?

A. We were picked up by two men in a small rowboat with an outboard motor and were taken to shore by holding onto the outside of the small craft.

Q. Could you tell us approximately how far off shore this airplane was?

A. I would say in the vicinity of one mile. [15]

* * * * *

Q. Did you operate any of the life preservers yourself, in view of the fact that you lost yours when you went into the water?

A. I did not.

Q. After you got up on the starboard wing, did you notice any of the other passengers with life preservers?

A. Several of the passengers had preservers on.

Q. Did your brother Charles have one on or did he have one?

A. He had one that was given to him by me immediately after the crash. However, to my understanding, he gave it to another passenger who could not swim.

Q. Do you happen to know or did you have any indication of the degree of the temperature after you left the plane and got out on the wing?

A. The water was cold enough to create a numbness in my limbs immediately afterwards.

* * * * *

(Deposition of Richard Pontius Fields.)

Q. What was the outside temperature, the weather temperature?

A. The weather temperature must have been in the vicinity of 32 because of snow falling immediately after the crash and staying visible on the survivors and the aircraft that was not submerged in the water.

Q. You recall being towed into shore by this [16] outboard motorboat and I would assume that you were taken someplace ashore for care; is that correct?

A. That is correct.

Q. Then where were you finally taken and how soon afterwards?

A. We were taken by Northwest to McChord Air Force Base within 24 hours after the crash.

Q. You were taken by another plane to McChord Air Force Base?

A. That is correct.

Q. McChord Air Force Base is where?

A. Near Seattle.

Q. Did you finally thaw out then after you arrived at McChord Air Force Base?

A. We were taken—the survivors were taken to the crash ward of McChord Air Force Base and at that time I indicated to the Air Force doctors that examined us that I had a numbness in my limbs and they explained this as frostbite of a degree, and some medication was performed, of what nature I am not familiar.

Q. How long did you convalesce?

A. One day.

Q. How long was it after the crash before you

(Deposition of Richard Pontius Fields.)

were completely free of any symptoms of this experience?

A. I was aware of this numbness in my limbs for many months when exposed to either extreme [17] cold or heat, either in the nature of air temperature or water temperature.

Q. Could you say how long approximately?

A. It is hard to say. I would say at the extreme a year.

Q. But the only time that you noticed it is when you were exposed to extreme temperatures?

A. That is correct.

Q. So by the end of the year 1952, roughly, were you pretty well and completely recovered from any effects physically from this incident?

A. Yes.

Q. Since then, say, starting in from the period of January 1st, 1953, up to this date, have you suffered any physical difficulties that you can attribute in any way to this accident? A. No.

Q. I take it, then, that when you were unable to see out of the plane during the landing and from your experience after you were rescued, that you never had an opportunity to observe the field in which the landing was attempted?

A. I was able to observe the condition of the same field, Sandspit, when departing on the other aircraft or the rescue aircraft the following night.

Q. What was the condition that you observed [18] that night when you departed for McChord Air Force Base?

(Deposition of Richard Pontius Fields.)

A. The runways, from a layman's point of view, not being an aviator, they were in good shape. However, the snow was banked from the runways to the sides making the runways below the surface of the snow. [19]

* * * * *

[Endorsed]: Filed March 12, 1957.

[Endorsed]: No. 15670. United States Court of Appeals for the Ninth Circuit. Northwest Orient Airlines, Inc., Appellant, vs. Geraldine B. Gorter, as Administratrix of the Estate of John M. Wal-drep, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: August 16, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15670

NORTHWEST ORIENT AIRLINES, INC.,
Appellant,
vs.

GERALDINE B. GORTER, as Administratrix of
the Estate of John M. Waldrep, Deceased,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant hereby adopts as its statement of points on which appellant relies in this Court, the statement of points filed by appellant with the Clerk of the United States District Court for the Western District of Washington, Northern Division, and which is a part of the Record on Appeal in the above-entitled cause.

Dated this 22nd day of August, 1957.

KARR, TUTTLE & CAMPBELL,

/s/ By COLEMAN P. HALL,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 24, 1957. Paul P. O'Brien, Clerk.

No. 15670

**United States Court of Appeals
For the Ninth Circuit**

NORTHWEST AIRLINES, INC., *Appellant*,

vs.

GERALDINE B. GORTER, as Administratrix of the Estate
of John M. Waldrep, Deceased, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

.. HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S OPENING BRIEF

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For the Ninth Circuit**

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United States Court of Appeals
For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant*,

vs.

GERALDINE B. GORTER, as Administratrix
of the Estate of John M. Waldrep, De-
ceased, *Appellee*.

No. 15670

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S OPENING BRIEF

I.

STATEMENT DISCLOSING JURISDICTION

The United States District Court for the Western District of Washington, Northern Division, the trial court, had jurisdiction of this cause by virtue of authority granted by the Congress of the United States in Ch. 646, 62 Stat. 930; 28 USCA, Sec. 1332. The complaint of appellee (R. 3-9) and the answer of appellant (R. 26-36), as amended (R. 45-47), disclose appellant to be a corporation organized under the laws of and a citizen of the State of Minnesota, appellee to be a citizen of the State of Washington, and the matter in controversy to exceed the sum of \$3,000 exclusive of interest and costs.

This appeal is from a final judgment (R. 92) entered in the United States District Court for the Western

District of Washington, Northern Division, in the amount of \$40,000 plus costs. This court has jurisdiction to review such judgment by virtue of Ch. 655, 65 Stat. 726; 28 USCA, Sec. 1291.

II.

STATEMENT OF THE CASE

Appellant, Northwest Airlines, Inc., is a Minnesota corporation engaged in the business of transporting cargo and passengers by air. On or about September 23, 1950, appellant entered into a contract with the United States Air Force whereby appellant agreed to transport between Japan and the United States such military personnel as the United States Government should from time to time designate (Pl. Ex. 9). Pursuant to such designation (Def. Ex. A-21) flight 324, a Douglas DC-4 type airplane, was dispatched by appellant January 17, 1952, from Tokyo, Japan, to McChord Field, Tacoma, Washington, with stops in Shemya in the Aleutian Islands and Anchorage, Alaska. John M. Waldrep, a sergeant in the United States Army, was assigned to, and was aboard said flight. The evening of January 18, 1952, flight 324 departed from Anchorage. At about 7:00 p.m. Anchorage time (R. 507) it became necessary to stop one of the airplane's four engines and to feather its propeller. The flight thereafter continued uneventfully on three engines. At approximately 1:30 a.m. January 19, 1952, a precautionary landing was attempted at Sandspit air field on the northeast tip of Moresby Island, one of the Queen Charlotte Islands, in the Province of British Columbia, Dominion of Canada. The runway at Sandspit is 5,150 feet in length and lies generally in a north and south direction (R. 747-9).

It was covered with a thin layer of snow (R. 746, 954) and snow banks lined the runway on either side (R. 746, 955). Oil flare pots placed along the snow banks were used to illuminate the runway (R. 954).

The airplane, still on three engines, landed approximately $\frac{1}{3}$ of the way down the runway (R. 954), and almost immediately full power was reapplied to the three engines in an apparent attempt to take off again (R. 145). The airplane became airborne, barely clearing a fence at the end of the runway (R. 747, 955). The plane failed to climb or maintain flying speed and settled into the adjacent waters of Hecate Strait. The cabin began to fill immediately with water and the airplane, still substantially intact, came to rest in the shallow water (R. 1125-6). The rudder fin and a portion of the left wing remained above water (R. 1126).

Sgt. Waldrep did not survive the accident. At the time of his death Sgt. Waldrep was a resident of the State of Alabama. On January 18, 1954, Geraldine B. Gorter, a Washington resident, was appointed special administratrix of the estate of John M. Waldrep by the Superior Court of the State of Washington. On the same day, the administratrix commenced this action on behalf of Sgt. Waldrep's only child, Judith Ann Waldrep, born January 22, 1952.

Appellee's complaint designates three separate counts for recovery of damages for the death of Sgt. Waldrep. Count one is based upon the State of Washington's wrongful death act, Revised Code of Washington 4.20.010, which is pleaded therein. Count two is based upon the Convention for the Unification of Certain Rules Relating to International Transportation by

Air, 49 Stat. 3000, popularly referred to as the Warsaw Convention. Count three is based upon the contract above referred to between appellant and the United States Air Force.

In her complaint appellee alleged that the accident happened in British Columbia. In its amended answer appellant admitted that the accident happened in British Columbia and denied the applicability of the Washington wrongful death act, the **Warsaw Convention**, and denied any liability under the Air Force contract. Further, paragraph IX and affirmative defense XII of the amended answer allege that the Families' Compensation Act of British Columbia, Canada, Ch. 116, British Columbia Revised Statutes, 1948 (Def. Ex. A-42) is applicable and that the one year statute of limitations contained therein is a bar to the maintenance of this action by appellee.

The cause was tried to the court, and the court found that appellant was negligent in various respects. In addition, notwithstanding contrary allegations in the complaint which were admitted in the answer, the trial court held that the accident did not occur in British Columbia; that therefore the Families' Compensation Act did not apply; that although the accident occurred in Canadian waters, plaintiff was entitled to recovery based upon the Washington wrongful death statute. The court then entered judgment against appellant in the amount of \$40,000 plus costs. No recovery was granted under counts two or three. Appellant's motion for new trial, as well as its motions to amend its answer and to reopen the cause for further testimony as to the law applicable at the place where the court found the

accident occurred, were denied, and this appeal followed. This appeal involves the following questions:

1. Did the airplane accident occur within the territorial boundaries of British Columbia, Canada, so that the British Columbia Families' Compensation Act applies?

2. Is appellee bound by the allegation of her complaint that the accident occurred in British Columbia, which allegation was admitted by appellant in its answer?

3. Are the parties bound by the prior adjudication of the Supreme Court of Washington that the accident occurred in British Columbia?

4. Is this action barred by the Statute of Limitations contained in the British Columbia Families' Compensation Act?

5. Does the Washington wrongful death act have any extraterritorial application to an accident occurring outside the territorial boundaries of the State of Washington?

6. Can it be presumed that a statute creating a cause of action for wrongful death has been enacted in a foreign country? If so, can it be further presumed that the foreign statute is identical with the wrongful death statute enacted by the legislature of the State of Washington?

7. Is this a proper case for the application of a presumption as to the foreign law?

8. Should appellant's witness, John Bird, have been prevented from testifying that there was no Canadian

law applicable, other than the British Columbia Families' Compensation Act, which afforded a remedy for wrongful death?

9. Should appellee's witness, John Cunningham, have been permitted to answer a hypothetical question as to the applicability of the British Columbia Families' Compensation Act when the question did not state whether or not the accident occurred in British Columbia?

10. Were the findings of fact upon which the damage award was based supported by the evidence?

11. Was the damage award excessive?

12. Should the court have permitted appellant to amend its answer to plead the law applicable at the place where the court found that the accident occurred, and have permitted the case to be reopened for further testimony as to that law?

13. Should the cost of producing unnecessary portions of the transcript and printed record be taxed to appellee?

These questions are raised by the pleadings, by appropriate and timely objections during the trial, offers of proof, appellant's motions to reopen and to amend, appellant's statement of points on which appellant intends to rely (R. 114), and by the following specifications of error.

III.

SPECIFICATION OF ERRORS

1. Error of the district court in making the following portion of Finding of Fact No. 2 (R. 83), which the evidence before the court does not support:

“That the decedent, John M. Waldrep, an American citizen, died on the 19th day of January, 1952, in the crash of an airplane operated by defendant at a point in salt water more than a half mile out seaward from low water mark and off shore of Sandspit, British Columbia, Dominion of Canada.”

The district court should have found that the crash was at a point in salt water landward from ordinary low water mark in British Columbia, Canada.

2. Error of the district court in making Finding of Fact No. 8 (R. 87), which the evidence before the court does not support.

The district court should have found from the evidence that the pertinent sections of the British Columbia Families' Compensation Act were pleaded and proved and that said Act was the only law affording a cause of action for wrongful death of an airplane passenger resulting from the crash of an airplane into the water in British Columbia, Canada; that said Act was applicable and in full force and effect at the time and place where decedent Waldrep died; that the one year limitation of action provided for in Section 5 of said Act is a bar to plaintiff's cause of action; that defendant has sustained by a preponderance of the evidence its 12th affirmative defense; that the wrongful death statute of the State of Washington has no application

and does not control or govern the rights of the parties in this cause.

3. Error of the district court in making the following portion of Finding of Fact No. 9 (R. 88), which the evidence before the court does not support:

“9. That the defendant has failed to sustain by preponderance of evidence in this case, facts necessary to support the allegations of their other affirmative defenses as to Count I of the plaintiff’s complaint. But on the contrary, the court finds that:

* * * * *

“e. That defendant failed to prove by the preponderance of the evidence any law other than the Wrongful Death Act of the State of Washington which would be applicable to this cause of action.”

The trial court should have found that defendant sustained by a preponderance of evidence facts necessary to support the allegations of its 12th affirmative defense based upon the one year statute of limitations contained in Section 5 of the British Columbia Families’ Compensation Act pleaded by defendant; that defendant pleaded and proved the pertinent provisions of said Act and has proved that said Act is the only law applicable to the facts of this case; that the Washington wrongful death act was not applicable.

4. Error of the district court in making Finding of Fact No. 10 (R. 88), which the evidence before the court does not support.

The district court should have found that the deceased Waldrep completed the tenth grade in school only, was unskilled, and from age sixteen spent nearly

all of his time in military service. That at the time of his death he was a buck sergeant, pay grade "E-4," in the United States Army. That it could be reasonably expected that the deceased Waldrep would support his dependents only to the extent that his means permitted. That Judith Ann Waldrep is a five-year-old girl, normal physically and mentally.

5. Error of the district court in making Finding of Fact No. 12 (R. 90), which the evidence before the court does not support. The damage award was excessive.

6. Error of the district court in making Conclusion of Law No. 4 (R. 90), which the evidence and facts do not support.

The district court should have concluded that the wrongful death act of the State of Washington was not applicable under the facts as found by the court or as claimed by the appellant. That thereunder appellee cannot maintain an action to recover damages for the death of Waldrep.

7. Error of the district court in making Conclusion of Law No. 5 (R. 90), which the evidence and facts do not support.

The district court should have concluded that appellee is not entitled to recover under the laws of the State of Washington.

8. Error of the district court in making Conclusion of Law No. 6 (R. 91), which the evidence and facts do not support.

The district court should have concluded that appellee was not entitled to judgment in any sum.

9. Error of the district court in entering judgment for appellee and against appellant under Count I of the complaint (R. 92).

The district court should have entered judgment dismissing appellee's complaint with prejudice and should have awarded appellant its taxable costs.

10. Error of the district court in denying appellant's motions to amend its answer, to reopen for further testimony, and for new trial. These motions were made so that appellant could plead and offer proof of the applicable law existing at the place where the court found the accident to have happened. The court should have granted said motions because the court's finding placed the accident in a jurisdiction different from that agreed upon by the parties in the pleadings, and settled in a prior adjudication of a case involving the same accident and the same parties, thus requiring the application of different laws.

11. Error of the district court in prohibiting witness, John I. Bird, from answering the following questions:

(a) MR. KOCH: "Would that jurisdiction be exclusive?" (Jurisdiction of the British Columbia Supreme Court to hear and decide litigation arising out of this accident.) (R. 1029).

Appellee objected:

MR. RILEY: "Yes, I do (object), Your Honor." (R. 1029).

(b) MR. KOCH: "What have you to say with respect to the exclusive aspects of such jurisdiction?" (R. 1029).

Appellee objected:

MR. RILEY: "Counsel intends to, and is about to

go outside the scope of his pleadings and his amended pleadings . . .” (R. 1029).

If admitted, the answers to questions (a) and (b) would have been that such jurisdiction was exclusive (R. 1040).

(c) MR. KOCH: “If the British Columbia court had before it a wrongful death action stemming from the accident, what law would the court apply?” (R. 1030).

Appellee objected:

MR. RILEY: “I want to object. The question is outside the scope of the pleadings. I believe he can ask ‘could it have applied?’ He cannot ask him whether it would have.” (R. 1030).

If admitted, the evidence would have been that the British Columbia court would have applied the Families’ Compensation Act (R. 1031-2).

(d) MR. KOCH: “If you know, will you state what the British North American Act is?” (R. 1037).

Appellee objected:

MR. RILEY: “If the court please, as to that question I would like to state that there is no reference to any other statute within the scope of these pleadings, and the question is irrelevant. It is completely outside the scope of defendant’s allegations as to the applicable law or what law could have been applied.” (R. 1037).

(e) MR. KOCH: “What government, if you know, has the exclusive authority to deal with regard to property and civil rights?” (R. 1038).

Appellee objected:

MR. RILEY: "I don't like the terminology 'exclusive,' and I am afraid what counsel is leading to; he wants something in the records that deals with the exclusive nature of this." (R. 1038).

(f) MR. KOCH: "What have you to say as to whether the Families' Compensation Act deals with matters affecting property and civil rights?" (R. 1038).

Appellee objected:

MR. RILEY: "I object, Your Honor. It is calling for a conclusion, and it is a leading question." (R. 1038).

The answers to questions (d), (e), and (f) would have shown that, as far as the Canadian lawmaking power is concerned, only the legislature of British Columbia could enact and deal in the field of property and civil rights, and that no other legislature or other courts in a different jurisdiction of Canada could have any function in that respect (R. 1038). Further, they would have shown that there was no wrongful death act under which appellant could claim even if the accident did not happen in British Columbia.

12. Error of the district court in permitting appellee's witness, John Cunningham, to answer the following hypothetical questions propounded by appellee:

(a) MR. RILEY: "I will ask you to assume that in January, 1952, a United States airplane operated by a United States corporation, Northwest Orient Airlines, Inc., pursuant to a contract with the United States Government, Department of the Air Force, left Japan with passengers for the United States, and after leaving Anchorage, Alaska, attempted to make an emergency landing at the

airstrip at Sandspit, British Columbia, but instead crashed into open water at a point approximately one-half to three-quarters of a mile from shore; and ask you to assume further that one of the passengers, a United States citizen, died, leaving surviving a wife and infant child; and assume further that the said death was caused by the wrongful act or acts of the carrier, Northwest Airlines, Inc.; and assume further that the administratrix of the deceased's estate brought an action for and on behalf of the said child; do you have an opinion as to whether or not Sections 3 and 5 of the Families' Compensation Act of British Columbia would apply to this state of facts?" (R. 1061).

MR. CUNNINGHAM: "I have." (R. 1061).

MR. RILEY: "What is that opinion?" (R. 1061).

Appellant objected:

MR. KOCH: "Your Honor, I must object to this testimony. If the court will refer to the pleadings in this case, it will observe in the *Gorter* case that it is alleged that this airplane crashed in British Columbia. It is admitted by the defendant's answer that the airplane crashed in British Columbia, and that it is a fact that is not in issue at this time. Therefore, if the witness is going to testify that any law other than the law of the province of British Columbia applies here, it is entirely inadmissible, Your Honor." (R. 1062).

"... I believe, in order for the hypothetical question to remain within the pleadings it must state: 'assuming that the accident happened in British Columbia, in Hecate Strait in British Columbia'." (R. 1063).

MR. CUNNINGHAM: "My opinion is that said Act would not be applicable." (R. 1065).

(b) MR. RILEY: "And would you state why you have so concluded?" (R. 1065).

Appellant objected:

MR. KOCH: "Just a moment, please. Now, again I must object, Your Honor, because it would appear that there is now an attempt to establish the applicability, perhaps, at least as far as I can tell from the question, of some other law, and, if so, that is certainly not in rebuttal to the proof in support of the affirmative defense."

MR. CUNNINGHAM: "The Families' Compensation Act of British Columbia has no extraterritorial operation, and the territorial jurisdiction of Canada and the right of the province ends at low water mark, at low water, and under the stated facts and in view of that fact, that is one reason.

"The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States. Also—"

MR. KOCH: "I don't think this is responsive." (1078).

IV.

SUMMARY OF ARGUMENT

- A. The Accident Happened in the Province of British Columbia, as Established by:
 - 1. The pleadings.
 - 2. The evidence.
 - 3. A prior adjudication involving the same accident and parties.
- B. The Law of the Place of the Tort Controls.
- C. Appellee's Action Is Barred by the Statute of Limitations in the British Columbia Wrongful Death Act.
- D. The Washington Wrongful Death Act Is Not Basis for Recovery.
 - 1. The law of the place of the tort controls.
 - 2. The accident and injury causing death took place either in the waters of the Province of British Columbia or in the adjacent waters of the Dominion of Canada.
 - 3. The Washington statute does not have extraterritorial effect.
- E. Appellee Failed to Plead or Prove the Foreign Law.
- F. A Presumption as to Foreign Law Is Not Basis for Recovery.
 - 1. Appellee has never relied on any foreign law.
 - 2. Appellee is estopped from relying on any foreign law or presumption.
 - 3. Appellant proved the foreign law (British Columbia).

4. Appellant's additional proof of foreign law was erroneously excluded.

5. The court erroneously applied the wrong foreign law presumption.

G. The Damage Award Was Excessive.

H. The Cost of Producing Unessential Portions of Record Should Be Taxed Against Appellee.

V.

ARGUMENT

A. THE ACCIDENT HAPPENED IN THE PROVINCE OF BRITISH COLUMBIA

The most critical error committed by the district court was in finding that the accident occurred "at a point in salt water more than a half-mile out seaward from low water mark and off shore of Sandspit, British Columbia, Dominion of Canada" (R. 83). This basic error laid the foundation for the erroneous findings that the law of British Columbia does not apply (R. 87), that the action is not barred by the limitation provisions contained in the British Columbia wrongful death statute (R. 87), that no applicable law was pleaded and proved by appellant (R. 87), and that the wrongful death statute of Washington should, therefore, be applied (R. 88). It is important that this finding of fact be meticulously examined. It is appellant's position that the pleadings preclude such a finding, that the finding was totally unsupported by any evidence and was contrary to all the evidence in the case bearing on this issue, and that the parties are bound by a prior adjudication to the contrary.

1. The Pleadings

The pleadings conclusively establish that the accident happened in the Province of British Columbia, Canada. In paragraph VI of appellee's complaint it is alleged that the accident happened "less than a mile offshore in the waters of Hecate Strait, British Columbia" (R. 5). This allegation was admitted by appellant in paragraph VI of its answer (R. 28). From then on where the accident happened and where Sgt. Waldrep died were no longer facts in issue. It became the agreed and uncontested fact of the case that the accident and death occurred in British Columbia. In exact conformity with this allegation it was the appellee's consistent position prior to and during the trial that the accident happened in British Columbia. Appellee made the following requests for admissions of facts:

"5. That the above-named decedent, J. M. Waldrep, was a passenger aboard Flight No. 324 . . . when the said aircraft crashed at Sandspit, British Columbia . . ." (R. 37).

"7. That the said decedent, J. M. Waldrep, died in the wreckage of . . . said aircraft . . . at Sandspit, British Columbia." (R. 38).

Again, in the pre-trial order, approved by counsel for both parties (R. 51), the accident is referred to as "the crash of Northwest Airlines Flight 324 at Sandspit, B. C., on January 19, 1952." And in a memorandum prepared by appellee (R. 18), appellee again recognized that the accident happened in British Columbia. There she stated that the crash occurred "in a foreign country" (R. 18) and that decedent died in Canada (R. 19). In that memorandum the appellee argued that the

Washington wrongful death statute should be applied even though the accident and death occurred in British Columbia. Even during the trial appellee's counsel several times stated that the airplane crashed at Sandspit, British Columbia (R. 542, 608), and no attempt to prove otherwise was made by appellee.

Appellee having taken the position that the accident and death occurred in British Columbia in her complaint, in her request for admissions of facts, in the pre-trial order, and in her memorandum of authorities, appellant amended its answer and affirmative defense by pleading the British Columbia Families' Compensation Act, alleging that it was the applicable law, and asserting the bar of its limitation provision. The issues were thus clearly drawn. The only question raised by the affirmative defense was whether appellee's action was barred by the one year limitation provision of the British Columbia Act, not whether the accident happened within or without the territory of British Columbia.

Nevertheless, the district court at the conclusion of the trial found that the accident did not happen in British Columbia and therefore that the British Columbia law was not applicable. This finding was directly contradictory to the allegations of appellee's complaint, which were admitted by appellant, and to the position taken by appellee in her request for admission of fact, in the pre-trial order, in her memorandum of authorities, and at the trial. Such finding was inconsistent with the theory upon which the case was submitted, and there was not a scintilla of evidence from which to make such a finding. This finding was inappropriate, erroneous, and extremely prejudicial.

2. The Evidence

Implicit in the court's finding is the assumption that British Columbia law has no effect seaward of low water. However, it is not all clear that low water mark defines the outer boundary of the Province of British Columbia. It is undisputed, however, that such boundary extends *at least* to low water mark. This was the testimony of both Mr. Bird and Mr. Cunningham, the British Columbia attorneys who testified at the trial as to the British Columbia law (R. 1042, 1066). Mr. Bird went on to state that the ownership of the area between low water mark and the three mile limit has never been judicially determined but that the governments of both British Columbia and the Dominion of Canada have enacted legislation on other subjects governing that area (R. 1042). Mr. Cunningham, called by appellee in rebuttal, did not deny this, but merely concluded without citation of any authorities that British Columbia territory ends at low water mark (R. 1066). As British Columbia has exercised governmental powers beyond low water mark, it is unreasonable to assume, as the district court has done, that the Families' Compensation Act is not also effective in that area, particularly in view of a recent and leading case which was cited to the district court holding to the contrary. *LeVal v. S.S. Giovanni Amendola*, 17 WWR 144 (R. 61).

The court's finding that the accident happened seaward from low water mark, and therefore outside British Columbia, is totally unsupported by any evidence. In fact, all of the evidence is directly to the contrary and would abundantly support a finding that the accident happened *landward* of low water mark.

Before discussing the evidence, the difference between low water mark and low tide should be made clear. Mr. Joseph M. Kildahl, a maritime navigation expert, explained that there are too low tides each day and that they vary in height from tide to tide. Low water mark on the other hand does not vary from tide to tide but is a fixed point representing an average of low tides taken over a period of 19 years (R. 1049, 1058). Mr. Kildahl then stated that during the year there would be low tides both higher and lower than low water mark (R. 1050).

During appellee's case in chief, no evidence was introduced from which it could be found that the accident happened seaward of low water mark. The only evidence presented during appellee's case in chief that even touched on the location of the accident was photographs of the wreckage 6 months after the accident, and irrelevant statements of Hufford Maynard, Donald Baker, and Dudley Cox, made while being examined as to other matters.

Mr. Maynard, a survivor and plaintiff in a case consolidated with this case for trial, testified that while waiting on the airplane to be rescued, he saw automobile headlights and house lights, although he could not see the actual shore (R. 147). He stated further that after takeoff from Sandspit, the crash of the airplane into the water was "practically instantaneous" (R. 188).

Mr. Baker, another survivor, testified by deposition that he could see land and the airport lights from the crashed airplane (R. 1132).

Mr. Cox, a member of appellant's accident investiga-

tion team, stated that in January, after the crash, an attempt was made to walk out to the wreckage at night at low tide (R. 636), but just short of reaching the airplane, they were forced to turn back because of the fog that came in and enveloped the area (R. 928).

The only other evidence offered by appellee was a series of pictures of the wreckage taken in June, 1952 (Pl. Ex. 29). Even though these pictures were taken while the tide was coming in (R. 1009), they show the remains of the airplane to be almost completely out of water.

No other evidence was offered by appellee which referred at all to the location of the airplane. The evidence offered does not show nor bear on the location of the airplane *with reference to the low water mark*.

During the presentation of appellee's case, other incidental references to location were made. Mr. Richard Fields, another survivor testifying by deposition, stated that the airplane was close to a mile from shore (R. 1161). Mr. Cox volunteered the information that the accident occurred half a mile off shore (R. 699). Mr. Sanders, another member of the investigation team, stated that his recollection was that the airplane was in the vicinity of half a mile from shore. He stated that he did not see the wreckage at low tide because in January, 1952, the only time he was there, the lowest tide was at about 1:00 o'clock in the morning. One attempt to walk out to the plane at the morning low tide was almost successful. Fog came in, however, and they were forced to turn back. He also stated that at low tide a boat was not practical because there was no water except for puddles (R. 928) in the runoff area, which was rocky

and studded with boulders (R. 855). Although he did not observe the wreckage at the early morning low tide (R. 927), he did observe the top of the fuselage out of water during the day (R. 928, 929).

None of the foregoing testimony bears on the crucial question of where the crash occurred in relation to low water mark. It is only the location of the wreckage with reference to low water mark that is important. The distance of the wreckage from shore is immaterial; neither is the location of the wreckage at a particular low tide material unless the low tide is in turn related to low water mark. Nowhere has appellee attempted to do this.

To prove its affirmative defense based on the British Columbia law, appellant offered proof to corroborate the admitted fact that the accident happened in British Columbia, landward of low water mark. The testimony of Mr. Donald Leonard was introduced. Mr. Leonard was regional safety engineering chairman for the Air-line Pilots' Association and as such was part of the team that investigated the accident in January, 1952, and again in June, 1952. He was the only witness testifying at the trial who actually climbed aboard the wreckage of the aircraft. In fact, Mr. Leonard went aboard on several occasions in June, 1952 (R. 996). On these occasions he walked out to the airplane, and the entire airplane was out of water. He testified that when he walked out to the plane on June 9, 1952, the remains of the airplane were completely out of water except for a section of the top that had become detached (R. 996). This top section was lying in a pool in the runoff area (R. 996, 997), which was rough, dotted by boulders as

high as a two-story house, and pitted with large holes (R. 994). He testified in part as follows (R. 996, 997):

MR. KARR: "Where the plane was situated when you returned in June, was it sitting on top of the sand, or was it buried to some extent?"

MR. LEONARD: "The inboard engine nacelles were buried to the bottom skin of the wing, and the bottom of the airplane was disintegrated and gone. Otherwise, the bottom surface of the wing was resting on the top of sand and rocks."

MR. KARR: "To what extent were the nacelles buried?"

MR. LEONARD: "Approximately 18 inches, the tip of the nacelles."

MR. KARR: "Were you out to the plane when you were at Sandspit in June, 1952?"

MR. LEONARD: "I was."

MR. KARR: "On more than one occasion?"

MR. LEONARD: "Yes."

MR. KARR: "How did you get out to the plane?"

MR. LEONARD: "We walked out to it."

MR. KARR: "You mean it was out of the water?"

MR. LEONARD: "Yes, sir."

THE COURT: "When did you do this?"

THE WITNESS: "The morning of June 9th."

MR. KARR: "Was the entire plane out of water at that time?"

MR. LEONARD: "What was remaining of the airplane was out of water. There was a large puddle of water roughly fifty feet in diameter (999), and I imagine, two, or two and a half feet deep. There were large depressions in this run-off area there

from the cockpit area, and the top section of the airplane was lying in this pool.”

MR. KARR: “I mean so far as the edge of the water is concerned, the tidal edge, was that beyond the plane or where?”

MR. LEONARD: “Yes, sir. The tidal edge, as best we could ascertain, would be about 75 feet from the center of the airplane.”

Salvage attempts were made to recover the airplane shortly after the accident in January, 1952 (R. 854, 993). Mr. Leonard, who was present at that time, testified that a fishing boat was hooked onto the airplane and an attempt to tow it made (R. 993). The towing was attempted in three different directions without success. In all, the airplane was not moved more than 100 feet total in all three directions (R. 994). In answer to a question of whether after salvage was abandoned the airplane was closer or farther away from shore, Mr. Leonard testified that it was approximately the same and that any movement was at best only parallel to the closest shore and not closer to shore (R. 994). When Mr. Leonard returned in June, 1952, the inboard engine nacelles of the airplane were substantially buried in sand (R. 996). He testified that the airplane appeared to be in exactly the same location and position as it was in January, 1952, when he left (R. 995).

To relate this testimony to low water mark, appellant introduced the testimony of Joseph W. Kildahl, a maritime navigation instructor holding a license as master of ocean, steam, and motor vessels, who was qualified as an expert witness. Mr. Kildahl testified that he was familiar with the Queen Charlotte Islands and the sea-

coast in the vicinity of Sandspit, British Columbia (R. 1047). He explained that low water mark has been determined by observing the low tides over a nineteen-year period (R. 1049, 1058). Low water mark is a fixed point and represents the average position of low tides throughout the period (R. 1049, 1058). He then stated that low water mark is designated zero and all tides are measured in terms of feet above or below that point (R. 1049, 1050).

Referring to tide tables for North and South America prepared and issued by the United States Coast and Geodetic Survey, a branch of the United States Department of Commerce (Def. Ex. A-43), Mr. Kildahl gave the heights of the tides at Sandspit, British Columbia on January 19, 1952, at the time of the accident, and on June 9, 1952, when Mr. Leonard walked out to the wreckage (R. 1057). At the time of the accident, the height of the tide was 12 feet and was rising at the rate of two feet per hour (R. 1057). This coincides exactly with the testimony of the survivors, Maynard and Baker, who testified that the tide was coming in and water gradually covered the plane (R. 149, 1126). Mr. Kildahl testified that on June 9 the height of the water at low tide was 1.1 feet above the height of the water at zero, low water mark. This was the date that Mr. Leonard walked out to the airplane and found it to be completely out of water. Mr. Kildahl then stated that there were other tides during the year 1952 both higher and lower than the low tide of June 9, 1952 (R. 1058).

There is no other testimony in the record with reference to low water mark. Mr. Leonard's testimony that the airplane was out of water at low tide on June 9,

1952, and Mr. Kildahl's testimony that low water mark was seaward of low tide on that day are conclusive. This testimony is highly credible and accurate. Mr. Leonard, an acknowledged aviation accident investigation expert, was the only witness who actually boarded the airplane after the accident. Mr. Kildahl, a maritime navigation expert, was the only witness testifying as to the heights of the tides with reference to low water mark.

3. Prior Adjudication

The district court was required to find that the accident did happen in British Columbia because this issue was previously adjudicated and is *res judicata*. Appellee was appointed administratrix by the Superior Court of Washington in a proceeding contested by appellant by a petition to revoke the letters of administration which had issued. The superior court found that the accident happened in British Columbia and rendered its decision in favor of appellee based partially on that fact. That decision was appealed to the Supreme Court of Washington by appellant and was affirmed. That case was *Northwest Airlines, Inc. v. Geraldine B. Gorter*, as administratrix of the estate of John W. Waldrep, deceased, 49 Wn.2d 711, 306 P.2d 213. In three separate places in that opinion, the supreme court held that the accident happened in British Columbia:

“The deceased (Waldrep) met his death in a Northwest Airlines plane which crashed in British Columbia.” (p. 712).

“The deceased (Waldrep) met his death in a crash of the Northwest Airlines plane in the Province of British Columbia, Canada.” (p. 712).

“In the case at bar . . . 3. The accident causing the death happened in British Columbia, Canada.” (p. 714).

The authorities unanimously agree that the parties are bound by facts determined in a prior action between the same parties. The rule is well stated in 30 Am. Jur. 920:

“It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief.”

Where the accident happened was a fact material to the state court decision and was one of the principal grounds advanced by that court in distinguishing a leading case in Washington upon which appellant had relied. Appellant and appellee were the only parties to the state court case and were represented in the Supreme Court of Washington by the same counsel as here. The same airplane, the same accident, and the same decedent were involved. The state court opinion even referred specifically to appellee’s complaint in this case.

It was determined in the state court case that the accident happened in the Province of British Columbia. That determination was *res judicata*, and the district court erred in finding that the accident did not happen there.

B. THE LAW OF THE PLACE OF THE TORT CONTROLS

It is a well settled principle of conflicts of law that the law of the situs of the tort governs the liability therefor. Where the various elements which make up the tort have their situs in different states, a choice must be made of one element, the situs of which will furnish the governing law. In this case negligence is alleged to have occurred in the States of Washington, in British Columbia, and elsewhere. Injury and death occurred in British Columbia. *The rule is settled by an almost unbroken line of authority* that where the choice is to be made between the law of the place where the negligent act or omission originated and the law of the place where the injury or death was inflicted, *the place where the injury or death was inflicted and not the place where the negligent act or omission originated is the place of the tort*, and its law governs liability and other substantive questions. Anno. 133 ALR 260, 261; *Rundell v. La Compagnie Generale Transatlantique* (1900; CCA 7th) 100 Fed. 655; *Hunter v. Derby Foods, Inc.* (1940; CCA 7th) 110 F.2d 970; *Vancouver S.S. Co. v. Rice* (1933) 288 U. S. 445, 77 L.Ed. 885, 53 S.Ct. 420; Stumberg, *Conflicts of Law*, 1937 Ed., pp. 163 to 168, and cases there cited; *Restatement, Conflicts of Law*, Section 377.

This universal rule has been applied without exception to the air cases. *Supine v. Air France* (1951) 100 F. Supp. 214, was a suit by an executrix in New York for wrongful death occurring in an air accident in the Azores; *Maynard v. Eastern Airlines* (1949 CCA 2nd) 178 F.2d 139, was a suit by a New Jersey administratrix for wrongful death in an airplane crash occurring in Connecticut; *Kendall and Sebo v. United Airlines, Inc. and Douglas Aircraft Co.* (1952 CCA 2d) 200 F.2d 269, was a wrongful death action arising out of an airplane accident in Pennsylvania; *Faron v. Eastern Airlines*, 84 N.Y. Supp.2d 568, was an action for wrongful death occurring when the airplane caught fire in New York and crashed in Connecticut. In each case, and in many others which could be cited, the court of the forum applied the law of the place of injury.

The rule that the law of the place of injury shall be applied by the court of the forum has been adopted in the State of Washington. *St. Germain v. Potlatch Lumber Co.* (1913) 76 Wash. 102, 135 Pac. 804, involved a suit to recover for the wrongful death of decedent in Idaho. The Washington court construed and applied the Idaho wrongful death statute and allowed a recovery. *Richardson v. Pacific Power & Light Co.*, 11 Wn. 2d 288, 118 P.2d 985, was an action by plaintiff as administratrix to recover damages for the wrongful death of her husband which occurred in Oregon. Decedent lived in Washington and worked out of the Walla Walla office of the power company. The court in affirming plaintiff's recovery under the Oregon wrongful death statute held that the existence and nature of a cause of action for tort are governed by the law of the

place where the wrong was committed, and that this rule applies to actions for wrongful death.

The Washington rule has been applied consistently by federal courts sitting in this jurisdiction. In *Martin v. Kennecott Copper Corp.*, 252 Fed. 207. Judge Neterer held that the plaintiff's right of recovery is statutory and the limitations of the parties are fixed by the Alaskan act. In *Northern Pacific Ry. Co. v. Adams*, 192 U.S. 440, 48 L.Ed. 513, the court stated that where suit is brought in the State of Washington to recover for a wrongful death occurring in Idaho, that the court of the forum shall apply the Idaho law. Plaintiff's right of action was held to rest on the statute of the State of Idaho, although the decision of the lower court was reversed on another point.

The most recent decision on the point of a federal court sitting in the State of Washington is *Jeffrey v. Whitworth College*, 128 F. Supp. 219. Suit was brought by plaintiff to recover for personal injuries sustained in an accident occurring in Idaho and caused by negligence which took place in Washington. In holding that it is immaterial that negligence occurred in Washington in view of the fact that it did not result in physical injury of the plaintiff in that state, Judge Driver stated in his opinion:

“It seems clear that in the instant case the wrong was committed in Idaho, even assuming, as I do, that within the State of Washington defendant received information and knowledge that toboggans could not safely be used at the Signal Point Ski Resort and that, in Washington, it failed to discharge its positive duty to warn plaintiff of the danger. No negligent act or omission in Washing-

ton resulted in any physical injury of the plaintiff in that state. Where the act or omission complained of occurs in one place and the injury is inflicted in another, the place of wrong or *locus delicti* is the place where the injury was sustained; or, as it has sometimes been stated, the place of wrong is in the state where the last event necessary to make an actor liable for the alleged tort occurs.”

This is the rule adopted by the British Columbia courts, too. Mr. John Bird, a British Columbia lawyer, testified that if this case had been brought in the British Columbia court, the law of the place where the injury took place would be applied by that court (R. 1075). However, at the trial appellee attempted to show that even if the accident happened in British Columbia, the courts of that jurisdiction would not apply the Families’ Compensation Act to this case. The district court did not make a finding on this point. Nevertheless, appellee’s unique contention should be discussed. John Bird, a British Columbia lawyer, testified that the British Columbia court, if it had before it a wrongful death action stemming from this accident, could apply (R. 1030) and would apply (R. 1031) the Families’ Compensation Act. On the other hand, John Cunningham, a British Columbia lawyer called by appellee, testified upon direct examination that in his opinion the Families’ Compensation Act would not be applicable, even if the accident happened in British Columbia (R. 1066). This conclusion was based upon his view that under British Columbia law the tort is deemed committed where the wrongful act takes place and not necessarily where the injury takes place (R. 1066). It was his opinion that the British Columbia court “would

apply the law of the United States” (R. 1066). On cross-examination, however, it is significant that Mr. Cunningham was unable to cite a single British Columbia or Canadian case or statute supporting **his contention** that the situs of the tort is where the wrongful act is committed rather than where the injury is inflicted. A portion of the examination follows (R. 1068-1069):

MR. KOCH: “If I understood your statement near the end of your direct examination, you stated that the tort is where the wrongful act takes place?”

MR. CUNNINGHAM: “That is my opinion, and that is the law.”

THE COURT: “Is that your opinion under the provisions of the Canadian law?”

MR. CUNNINGHAM: “Canadian law applying English law.”

MR. KOCH: “What Canadian authorities support that view?”

MR. CUNNINGHAM: “There is a case, *George Monroe, Ltd., v. American Cyanamid Corporation, Ltd.*, 1944, 1 King’s Bench 432, which has been approved in a conflict of law text, and the case itself has been referred to in British Columbia courts.”

MR. KOCH: “Is that a British Columbia decision?”

MR. CUNNINGHAM: “That is a decision of the Court of Appeals in England, I believe.”

MR. KOCH: “Is that decision binding on the British Columbia courts?”

MR. CUNNINGHAM: “It is not necessarily binding, but it is my opinion it would be followed by the British Columbia courts.”

MR. KOCH: “We are only concerned with what

the controlling authority is in British Columbia. Is there any British Columbia case on that subject so holding?"

MR. CUNNINGHAM: "The *American Cyanamid* case has been quoted and referred to in a British Columbia case."

MR. KOCH: "Is there any decision holding that the tort is where the wrongful act takes place, decided by a court of last appeal in British Columbia?"

MR. CUNNINGHAM: "There may be, but I cannot cite it if there is one, and I do not know it."

MR. KOCH: "Can you cite a Supreme Court of Canada decision to that effect?"

MR. CUNNINGHAM: "No, I cannot."

In addition, on cross-examination Mr. Cunningham was repeatedly asked what he meant by "wrongful acts." He consistently evaded the questions, refused to give responsive answers, and refused to define "wrongful acts" (R. 1071).

Mr. Cunningham has been admitted to practice in all courts in Canada and has appeared in all the courts of British Columbia and in the Supreme Court of Canada (R. 1060). Yet he cited no British Columbia or Canadian case applying or even endorsing his theory and then states he knows of none. Has he shown that his theory is the law of British Columbia? The answer is obviously "no." The only case which Mr. Cunningham cited in support of his theory is an English decision which the British Columbia courts are not bound to follow and have never followed (R. 1069). Also, a careful reading of that case will reveal that a conflict of laws

question was not involved, but only a court rule dealing with service of process on non-residents. It is also significant to note that according to Mr. Cunningham this English decision has been referred to in a British Columbia case (R. 1069), yet Mr. Cunningham did not cite this British Columbia case as supporting his view. Only two conclusions can be drawn from his failure to do so: Either the British Columbia case did not refer to the English case on the point in question, in which event Mr. Cunningham has misled the court, or else the British Columbia case rejected or disapproved the theory of the English decision as not stating the law of British Columbia.

At the conclusion of Mr. Cunningham's testimony, Mr. Bird was recalled, and testified that the British Columbia court would not have an option to apply the law of the United States, but it would apply the law of the place where the injury occurred (R. 1075).

However, assuming Mr. Cunningham's theory to be the law of British Columbia, where was the wrongful act committed? Even Mr. Cunningham agreed that if the wrongful act and injury both took place in British Columbia, its court would apply the law of British Columbia (R. 1071). The district court found that there were twelve separate wrongful acts and omissions. Such acts and omissions took place in a number of places, among which were Tokyo, where the passengers were instructed in emergency procedures; Anchorage, where the airplane was inspected and serviced; British Columbia, where the attempted landing was made and the crash occurred; Seattle, where the literature and emergency equipment were put aboard the airplane;

and St. Paul, where engine time and service records were compiled and kept. All of such omissions, except those actually taking place in British Columbia, were of a continuing nature and extended to all jurisdictions through which the airplane travelled. The acts and omissions which were the immediate cause of the accident all took place in British Columbia where the landing was attempted. There is only one place in which it may be said that all acts and omissions took place, and that place is British Columbia. Since the wrongful acts and the injury both occurred in British Columbia, certainly the British Columbia court would apply the British Columbia law.

It should be observed, however, that what the British Columbia court would have done and what law it would have applied are entirely immaterial because this case is not before that court. It would be material only had the district court adopted the English conflict of laws theory of *renvoi* and applied the British Columbia conflicts of laws rule rather than its own rule. Simply stated, *renvoi* means that the foreign conflicts of law rule as well as its substantive law should be applied. According to Professor Beale in his book entitled "A Treatise on the Conflict of Laws," page 56, the English theory has had but limited acceptance in the United States and its use has been severely confined even in England. He then points out that in this country the conflict of laws rules of the forum only are applicable, with the possible exception of cases involving divorce and title to foreign real estate. In tort cases the forum's conflict of laws rule is always applied. This is also the view of the Restatement of Conflict of Laws, Sec. 7.

Professor Stumberg in "Principles of Conflict of Laws," page 11, states: "It seems to be quite generally accepted that 'renvoi' is no part of the American law." Appellant is aware of no federal or Washington cases adopting the *renvoi* theory. The British Columbia conflict of laws rule and Mr. Cunningham's view thereof are immaterial and are of no consequence here. The district court should have found that the law of British Columbia, including the Families' Compensation Act, was applicable to this case and fixed the rights of the parties.

C. APPELLEE'S ACTION IS BARRED BY THE STATUTE OF LIMITATIONS

In this case the accident and death occurred January 19, 1952. Suit was commenced in the District Court for the Eastern District of Washington January 18, 1954. The pertinent sections of the British Columbia wrongful death statute, the Families' Compensation Act, in force January 19, 1952, were pleaded in affirmative defense XII of appellant's amended answer and proved to the satisfaction of the trial judge (R. 1039). Sections 3 and 5 of the Act provide as follows (Ref. Ex. A-42):

"Section 3. Whenever the death of a person shall be caused by wrongful act, neglect, or default and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, and notwithstanding the death of the person injured, and although the death shall have been caused un-

der such circumstances as amount in law to an indictable offense.”

“Section 5. Not more than one action shall lie for and in respect of the same subject-matter of Complaint; and every such action shall be commenced within 12 calendar months after the death of such deceased person.”

If the accident in which Waldrep died occurred in British Columbia as appellant contends, the British Columbia substantive law must be applied. The one-year limitation provision of the Families’ Compensation Act is substantive.

The general rule is that the remedy is procedural as distinguished from the right which is substantive, and that the law of the forum applies on matters of procedure. 11 Am. Jur. Sec. 191, page 505. There is a well recognized and universally accepted exception, however, where a statutory liability (wrongful death statute) is sought to be enforced, and that statute prescribes the period of limitation. In that circumstance the general rule adopting the statute of limitations of the forum is departed from, and the limitation prescribed by the statute fixing the liability is applicable. 11 Am. Jur., Sec. 194, page 509: *Central Vermont R. Co. v. White*, 238 U.S. 507, 59 L.Ed. 1433, 35 S.Ct. 865; *Davis v. Mills*, 194 U.S. 451, 48 L.Ed. 1067, 24 S.Ct. 692; *Theroux v. Northern Pac. R. Co.*, 64 Fed. 84 (CCA 8th 1894); *Calvin v. West Coast Power Co.*, 44 F.Supp. 783 (D. C. Ore. 1942); *Negaubauer v. Great Northern Ry. Co.*, 92 Minn. 184, 99 N.W. 620 (1904); 3 Beale, *Conflict of Laws*, Sec. 605.1; *Restatement, Conflict of Laws*, Sec. 397, 603, 605; 68 A.L.R. 210; 146 A.L.R. 1356; 16 Am. Jur. 110, 111.

It is such a wrongful death statute that is before the court in this case. Section 5 of the Families' Compensation Act limits to one year the time within which one entitled to the benefits under the statute may bring suit.

Mr. Bird, the expert witness on British Columbia law called by appellant, testified that Section 5 of the Families' Compensation Act is not procedural but is a part of the British Columbia substantive law (R. 1036). Mr. Bird's testimony on this point was not disputed by appellee's expert on British Columbia law, Mr. Cunningham, nor otherwise refuted.

Apart from the foregoing and as additional authority binding on federal courts sitting in the State of Washington, this state by statute has decreed that a cause of action arising in another jurisdiction and there barred by lapse of time cannot be maintained in this state. R.C.W. 4.16.290, "Foreign statutes of limitation, how applied" provides:

"When the cause of action has arisen in another state, territory or country between nonresidents of this state, and by the laws of the state, territory or country where the action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

The district court should have found that Sec. 5 of the Families' Compensation Act was applicable to this case and that appellee's action was barred because it was not commenced within one year from the date of Waldrep's death.

D. WASHINGTON WRONGFUL DEATH ACT IS NOT A BASIS FOR RECOVERY

The district court found in Finding of Fact 8 (R. 87) that the wrongful death statute of the State of Washington was applicable and granted recovery to plaintiff thereunder. The Washington statute is not applicable and can furnish no basis for recovery in this case for the following reasons:

1. The law of the place of the tort controls.

It is conceded that the injury and death did not occur in the State of Washington. It has already been pointed out that the law of the place of the tort controls, *supra*, pp. 28 to 36. The Washington law is not applicable under the universal conflict of laws principle. It is apparent that the wrongful death statute, if any, of the place where the injury was inflicted governs this action for wrongful death, not the Washington statute.

2. The accident and injury causing death took place either in the waters of the Province of British Columbia or in the adjacent waters of the Dominion of Canada.

Finding of Fact 2 (R. 83) and the court's decision (R. 72) locates the accident and injury below low water mark and outside of British Columbia jurisdiction. Appellant contests this finding because the pleadings, evidence and prior adjudication establish conclusively that the accident and injury did occur in British Columbia. If the accident did not happen in British Columbia, it must have happened in the waters of the Dominion of Canada. Appellee's complaint and all the

evidence establish that the crash occurred “less than a mile off shore in the waters of Hecate Strait, British Columbia” (R. 5). Appellant admits this fact in its answer, and there is no evidence in the record to the contrary. Under the controlling conflict of laws rule, the applicable law is that of British Columbia or the Dominion of Canada.

3. The Washington statute does not have extraterritorial effect.

It is a well-known principle that the statutes of a state have no extraterritorial operation. In 50 Am. Jur. 508, Statutes, Sec. 485, it is stated:

“It is frequently declared that statutes can have no extraterritorial effect. By this statement it is meant that legislative enactments can only operate, *proprio vigore*, upon persons and things within the territorial jurisdiction of the lawmaking power, and that no law has any effect, of its own force, beyond the territorial limits of the sovereignty from which its authority is derived. Thus, the general rule is that no state or nation can, by its laws, directly affect, bind or operate upon property or persons beyond its territorial jurisdiction. A statute which purports to have such operation is invalid. A statute may, however, be valid insofar as it relates to persons or things within the jurisdiction and invalid insofar as it relates to persons and things outside the jurisdiction.”

Further, it is presumed that a statute is not intended to have extraterritorial effect. 50 Am. Jur. 508, Statutes, Sec. 487.

The Washington Supreme Court has followed and applied these general rules in *Fisch v. Marler*, 1 Wn.2d

698, 707, 97 P.2d 147, and in *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145.

The same rules have been applied to wrongful death statutes, and the decisions of state and federal courts and the text writers furnish overwhelming authority. In 16 Am. Jur. 252, Death, Sec. 388, it is stated:

“Wrongful death statutes have, in themselves, no extraterritorial effect.”

In Section 389 it is stated:

“It is established by the overwhelming weight of authority that the existence of a right of action for wrongful death must be determined by the law of the place where the fatal injury was inflicted. If that law gives no right of action, no action may be maintained, although the statute of the forum gives such a right.”

Herbert Goodrich, in his *Handbook of the Conflicts of Laws*, 2nd Edition, states at page 251:

“No action may be brought in one state of injuries resulting in death which were inflicted in another state, unless an action is given by the laws of the state where the injury occurred. It is not enough that there is such a statute at the forum allowing recovery for death by a wrongful act.”

The following are but a sampling of the many cases supporting the rules in wrongful death cases:

Calvin v. West Coast Power Co., 44 F.Supp. 783 (Ore. 1942);

Jeffrey v. Whitworth College, 128 F.Supp. 219 (Wash. 1955);

Faron v. Eastern Airlines, 84 N.Y. Supp.2d 568 (1948);

Rose v. Phillips Packing Co., 21 F.Supp. 485 (Md.);

Ross v. Eaton, 6 A.(2d) 762 (N.H.);

Keese v. Atlantic Greyhound Corp., 197 S.E. 522;

Summar v. Besser Mfg. Co., 17 N.W.2d 209 (Mich.);

Baldwin v. Powell, 61 N.E.2d 412 (N.Y.);

Diatel v. Gleason, 22 F.Supp. 335 (N.Y.).

It should be pointed out, however, that one state, Pennsylvania, follows a rule differing slightly from the general rule. The Pennsylvania courts, too, apply the law of the place where the injury occurred, even in cases where negligence is alleged to have occurred within the State of Pennsylvania, except where the injured person returns to the State of Pennsylvania and dies there. In the latter event, the law of Pennsylvania is applied. The early cases of *Derr v. Lehigh Valley R. Co.* (1893) 158 Pa. 365, 27 Atl. 1002, and *Hoodmacher v. Lehigh Valley R. Co.* (1907) 218 Pa. 21, 66 Atl. 975, announce the Pennsylvania exception to the otherwise accepted rule. In both cases the decedent died in Pennsylvania from injuries received in New Jersey caused by negligence taking place in Pennsylvania. In the first hearing of the *Hoodmacher* case, it was assumed that the decedent died in New Jersey instead of Pennsylvania, and under these assumed facts the court held that the New Jersey law must apply. When it was brought out on rehearing that the death

actually occurred in Pennsylvania, the court applied the Pennsylvania law.

Even the Pennsylvania court has regarded its rule as anomalous and undesirable. In the more recent case of *Mike v. Lian* (1936) 322 Pa. 353, 185 Atl. 775, the court applied the Ohio law to an accident resulting in injuries in Ohio, caused by negligence occurring in Pennsylvania. In its opinion, the court stated:

“Disregarding the broad language which was employed in them (*Hoodmacher* and *Derr* cases), a careful analysis shows that the only actual inconsistency with the rules above enunciated occurs in the decision on the re-argument in the *Hoodmacher* case, where the court, apparently influenced by the fact that this is a death action, seized upon the place of death as determining the applicable law. It should be pointed out, however, that as time brought about a further clarification of the theory underlying the statutory death action, our court has placed more emphasis on the place where the injuries are received than on the place where the death occurred. . . . ”

Even under the Pennsylvania rule, which the Pennsylvania court now disapproves, the statutes of either British Columbia or the Dominion of Canada would apply to the instant case. The Washington wrongful death act could not apply because the injuries and death of Waldrep occurred in either British Columbia or the Dominion of Canada.

Extensive research by appellant has revealed only one other situation in which a state's wrongful death act was applied to a death resulting from injuries sustained elsewhere. In a very few old maritime cases a

state death statute has been applied where an injury and resulting death occurred aboard ship on the high seas. These cases all arose prior to the passage of the federal Death on the High Seas Act, 46 USCA 761, which creates a cause of action for wrongful death resulting from injuries sustained on the high seas. These early cases were based upon the principle that the ocean vessel was part of the physical territory of the state of which the owner was a resident. The only statute which could be applied then was that of the state of the owner's residence. *McDonald v. Mallory*, 77 N.Y. 546 (1879); the *E. B. Ward*, 17 Fed. 456 (1883); *Lindstrom v. International Navigation Co.*, 123 Fed. 475 (1903); and *Southern Pacific v. DeValle DeCosta*, 190 Fed. 689 (1911), are cases supporting this view.

Because of the obvious limitations of this fiction, two later cases took a slightly different approach. In both *The Hamilton*, 207 U.S. 298, 52 L.Ed. 264 (1909), and *The James McGee*, 300 Fed. 93 (1924), the wrongful death act applied was again that of the state of which the owner of the offending vessel was a resident. In *The Hamilton*, the court reasoned that each state has the power to govern the liabilities resulting from acts of its citizens whether within or without the state so long as the acts are not committed within the territorial jurisdiction of another state, country, or sovereignty. The *McGee* case also follows this view.

The passage of the Death on the High Seas Act rendered the unique doctrine of these few maritime cases unimportant and obsolete. Because of the Act, resort to the fiction has been abandoned, and since its enact-

ment no such cases have arisen in which recovery was based on a state wrongful death statute.

Regardless of which rationale, if either, was the correct one, the necessary prerequisites to the application of the state death statute were identical under each. In all the cited cases the prerequisites were as follows:

1. The owner of the vessel must have been a citizen of the state whose law was to be applied;
2. The vessel must not have been within the territorial jurisdiction of another sovereignty at the time the fatal injury was inflicted.

It is clear that these cases and the rule which they apply have no similarity to the case now before the Court. The defendant is not a citizen of the State of Washington. The airplane crash occurred within the territorial jurisdiction of another sovereignty, either the Province of British Columbia or the Dominion of Canada. Neither of the requirements is met. Furthermore, the accident did not take place aboard an ocean-going vessel, but rather aboard an airplane to which the maritime law is inappropriate and has never been applied. These maritime cases furnish no basis for applying the Washington wrongful death statute.

E. APPELLEE FAILED TO PLEAD OR PROVE THE FOREIGN LAW

If the accident happened in British Columbia, the British Columbia Families' Compensation Act applies and governs the rights of appellee. If, as the district court found, the accident happened seaward of low water mark, what law gives appellee the right to sue appellant for the death of Waldrep? Appellee has not

pleaded or proved any statute or law other than the wrongful death act of Washington. The accident, however, did not occur in Washington, and the Washington act does not afford appellee a basis for recovery. The truth of the matter is that appellee has simply failed to plead or prove any law existing at the place where the accident happened. It has been pointed out that the law of the place where the accident happened determines whether or not a right of action for wrongful death exists.

If she is claiming under any foreign law, appellee has the duty of pleading and proving that law. This rule is well stated in 41 Am.Jur. 296, under the section entitled "Pleading, Laws of Other Jurisdictions":

"Where it is not otherwise provided by statute, the courts do not take judicial notice of the laws of foreign states, and where such statutes are material to the controversy and are relied on as a basis of a right of action or as a defense, they must be set forth by the pleader so that the court may judge of their effect. The rule applies as well to the statutes of a foreign country and those of a sister state, neither of which is provable if not pleaded."

Washington has adopted, with stated exceptions, the Uniform Judicial Notice of Foreign Laws Act, Revised Code of Washington, Ch. 5.24. This statute permits the court to take judicial notice of the laws of the sister states. R.C.W. 5.24.010. It does not, however, relieve the party from pleading such laws R.C.W. 5.34.040. The laws of a foreign country or jurisdiction still must be pleaded and proved without aid of judicial notice. R.C.W. 5.24.050.

The rule is again stated in 20 Am. Jur. 182 under the section entitled "Evidence, Foreign Laws":

"Ordinarily, when a litigant relies upon such foreign laws as the basis for his claim or defense, he must plead and prove such laws."

The Restatement of Conflict of Laws is in accord:

"Section 621, Proof of Foreign Law.

"Except as stated in section 622, foreign law must be alleged in the pleading and proved by evidence."

"Section 622, Foreign Common Law.

"In the absence of evidence, the common law of another common law state is presumed to be the same as the common law of the forum."

"Section 623, Foreign Statutory Law.

"There is no presumption that the statutory law of another state is the same as that of the forum."

This is also the rule followed in the federal courts. *Harris v. American International Fuel Co.*, 124 F. Supp. 878; *Finne v. KLM*, 11 FRD 336.

Appellee has pleaded no foreign law nor has she attempted to prove any. If the accident happened in British Columbia as appellant contends, *appellee* should have pleaded and proved such laws of British Columbia as she thought gave her a right of action for wrongful death. She failed to do so because she realized that an action based on the British Columbia Families' Compensation Act was barred because not timely commenced. Appellee did not plead or attempt to prove any law of the Dominion of Canada creating a right of action for wrongful death. Her failure in this respect is easily explained by the fact that there is no such law.

This would have been the testimony of Mr. Bird had he been permitted by the court to testify (R. 1038-1039). Having failed to plead or prove any law existing at the place of the accident creating a right of action for wrongful death, appellee's action should have been dismissed and judgment entered for appellant. This was the result reached in *Cuba Railroad v. Crosby*, 222 U.S. 473, 56 L.Ed. 274, which the district court was bound to follow. Having failed to plead or prove any applicable foreign law giving her a cause of action, appellee was not entitled to recover judgment. It was error to award appellee judgment based on inapplicable Washington law.

F. PRESUMPTION AS TO FOREIGN LAW IS NOT BASIS FOR RECOVERY

Having failed to plead or offer proof of controlling foreign law, appellee, at the conclusion of the trial, requested the court to presume that such foreign law was the same as the Washington death statute. By so doing, appellee sought to avoid dismissal of her action because of her failure to plead and prove the controlling foreign law. The district court seems to have adopted this approach, and in this way applied the Washington wrongful death statute even though it has no extra-territorial force and, under controlling conflict of laws rules, cannot be applied to the accident. It was error for the district court to presume the foreign law for the following reasons: Appellee at no time relied on any foreign law as a basis for recovery; appellee should be estopped from now relying on foreign law; appellant proved the applicable British Columbia law; appel-

lant's additional proof of the foreign law existing at the place where the court found the accident happened was erroneously excluded; the district court applied a rule of presumption that has never been adopted by either the federal or Washington courts. These reasons will be taken up in order.

1. Appellee has never relied on any foreign law.

Unless one is relying in some way upon the laws of a foreign country, there is no room for the application of any sort of a presumption as to the laws of that foreign country. In short, the foreign law is not a matter in issue. In paragraph II of her complaint appellee, though alleging that the accident occurred in British Columbia, Canada, stated that the action was brought "pursuant to paragraph 4.20.010 of the Revised Code of the State of Washington . . . " (R. 6). No mention or reference was made to foreign law nor was there any indication that appellee was claiming under foreign law. Accordingly, appellant in paragraph 9 of its answer specifically denied the applicability of the Washington statute pleaded by appellee (R. 28-9). The issue was thus joined. Even when appellant amended its answer and pleaded the British Columbia death statute, appellee denied its applicability and continued to rely solely on the Washington act. Had not appellee pleaded the applicability of the Washington statute, perhaps there would be an inference that appellee was claiming under the foreign law. By pleading the Washington act and claiming under it exclusively, however, she took an unequivocal position from which she never receded until the trial had ended.

As additional proof that appellee was relying on the direct application of a Washington statute and not on any foreign law, appellant directs the court's attention to a memorandum of authorities submitted to the district court by appellee (R. 17). Throughout the portion of this memorandum relating to Count 1 of her complaint, appellee took the position that the Washington statute had extraterritorial effect; that it was not necessary that the accident occur in the State of Washington for the Washington statute to apply. In addition, she cited therein many cases and discussed public policy considerations in support of her view that, because acts of negligence occurred in Washington, the Washington act should be applied. After four pages of such argument, appellee observed in a single short paragraph that the complaint stated a cause of action even though the foreign law was not pleaded. It was clear that appellant did not intend to rely and did not rely on the foreign law.

Appellee maintained this position, when appellant moved to amend its answer to plead the foreign law which appellant considered applicable, upon the ground that both parties had recognized at all times that appellee's rights were based upon the applicability of the Washington wrongful death statute. In an affidavit in opposition to the motion (R. 44), appellee's counsel stated:

“Plaintiff has relied in preparation of its case upon the pleadings as they exist based upon the proposition that the laws of forum will govern the matters now at issue herein.”

Even as late as the last day of trial, appellee main-

tained this position. While examining Mr. Cunningham, with reference to the British Columbia law, counsel for appellee stated that appellee was not attempting to prove any law but was instead attempting to show that foreign law did not apply. He stated (R. 1062): "We are not proving any law." At page 1006 he said: "This is strictly in rebuttal. We are not trying to prove any law." Appellee consistently claimed that the Washington act was directly controlling. At no time has she based her claim on a foreign statute. At no time has she claimed that any foreign law was applicable. Instead, she relied at all times on the Washington statute only. From appellee's standpoint, foreign law was not material and a presumption as to the foreign law should not have been a part of her case.

2. Appellee should be estopped from relying on any foreign law or presumption.

As pointed out above, from the time this action was commenced in January, 1954, until April, 1957, at the conclusion of the ten-day trial, appellee steadfastly maintained that her rights were governed exclusively by the Washington death statute. Not until after all of the evidence was presented did appellee claim that foreign law was applicable. It was at that time that she asserted that appellant had not pleaded or proved any applicable foreign law, and that, therefore, the court should presume the applicable foreign law to be the same as the Washington death statute.

The district court then found, contrary to the pleadings, that the accident did not happen in British Columbia. Appellee was allowed to rely on foreign law

at the place the court found the accident to have happened and the court then presumed that such law, if any, was the same as the Washington death statute. The court refused to permit appellant to offer proof of the foreign law actually existing at this new place of the accident, even though for the first time such foreign law became material to the case.

Appellant had a right to and did rely on the pleadings as establishing the place of the accident. The complaint identified the statute under which appellee claimed. The court, by permitting appellee to change her position after all the evidence was in and to rely on foreign law other than that pleaded or proved, has prejudiced, critically, appellant's position. Appellant has been denied all opportunity to prove the unpleaded and unproved foreign law purportedly relied upon by appellee. Appellee should be estopped now from relying on any unpleaded and unproved foreign law and from resorting to any presumption regarding such foreign law.

It was under strikingly similar circumstances that the Court of Appeals, Eighth Circuit, decreed such an estoppel in *Petersen v. Chicago, Great Western Railway Co.*, 138 F.2d 304. The plaintiff in that case sued in Nebraska for personal injuries sustained in Iowa but did not plead the Iowa law or *any foreign law*. The allegations of her petition were based on the theory of the Iowa statute. At the trial she submitted a memorandum setting forth the Iowa statute and decisions. Evidence sufficient to make out a case under the Iowa law was introduced. She proposed instructions framed on the

theory of the Iowa law. Not until all the evidence was in did she change her position and assert that the law of Nebraska should be applied because the Iowa law was not pleaded or proved. In view of her position throughout the action, the court was quick to hold that the plaintiff could not thus change the theory of her case, and she was estopped from doing so. The Iowa law was applied even though not pleaded or proved.

Similar principles of estoppel have been applied in the following cases:

Crocker v. Russell, 133 Ore. 213, 287 Pac. 224;

Minneapolis and St. Louis Railway Co. v. Winters, 242 U.S. 353, 61 L.Ed. 358;

Arkansas Anthracite Co. v. Stokes, 2 F.2d 511.

Appellant, having relied upon appellee's pleadings and conduct as stating her position, was prejudiced when, after all the evidence was in, appellee changed her position as to the law applicable to this case. Because the district court refused to permit appellant to prove such law, appellee should now be estopped from relying upon it or upon any presumption as to its contents.

3. Appellant proved the foreign law (British Columbia).

Appellant proved the law of British Columbia in effect at the time of the accident, January 19, 1952. Hence, there was no justification for a presumption that such law was identical to the Washington wrongful death statute. Mr. Bird testified that the British Columbia legislative body enacted the Families' Compensation Act having full authority to do so (R. 1038).

Duly authenticated copies of Sections 3 and 5 of that Act (Def. Ex. A-42) were admitted into evidence (R. 1033). Section 3 creates a right of action for wrongful death, and Section 5 provides the time within which such an action must be brought. No contention has been made that this statute does not set forth the law of British Columbia. In fact, the district court considered that Sections 3 and 5 set forth the law on the subject and that such law was sufficiently proved (R. 1039). No evidence to the contrary was offered, even by Mr. Cunningham, appellee's expert on British Columbia and Canadian law.

4. Appellant's additional proof of foreign law was erroneously excluded.

No presumption as to the foreign law should have been resorted to because the district court by a series of errors refused to receive proof of the actual controlling foreign law. This case went to trial on the issues as framed by the pleadings, *viz.*: Does the Families' Compensation Act of British Columbia or the wrongful death statute of Washington apply to an accident happening in British Columbia?

At the trial appellee proved no law (R. 1062, 1066). Appellant proved the pertinent sections of the British Columbia Families' Compensation Act (R. 1039) based upon the proposition that the accident happened in British Columbia, as agreed in the pleadings. When appellant attempted, through Mr. Bird, to prove that this was the only British Columbia statute giving a right of action for wrongful death, the court sustained appellee's objection to the proof (R. 1029-31). The testimony

was excluded on the theory that appellant had not alleged that the Families' Compensation Act was the *only* act under which appellee could claim (R. 1029). Appellant did so allege, however, in paragraph IX of its amended answer (R. 46):

“Defendant specifically denies the applicability of Section 4.20.010 of the Revised Code of Washington and alleges that *the* applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statute, 1948, entitled ‘Families’ Compensating Act; . . .’ ”
(Emphasis added)

Appellee and the district court misconstrued the allegation, and placed an erroneous interpretation on common everyday words that have well-understood meanings. They emphasized and construed the words “could have been based” as meaning the pleaded statute was only one of several upon which the action could be based. The words “the applicable statute” were completely disregarded. “The” is defined in Webster's Collegiate Dictionary as follows: “A demonstrative word used especially before a noun to particularize its meaning; as, *the* man, that is, a particular man, as distinguished from a man and from the generic man. Its various special uses are: . . . 4. Before a noun which it marks as denoting one unique of its kind;” The allegation is clear, “the (only) applicable statute” is the Families' Compensation Act; appellee's claim could have been based on that statute had she so desired and had she commenced her action within the time provided by the statute. The construction placed on this allegation by the court was incorrect, prejudicial and con-

trary to the rule generally followed, especially in the federal courts, that pleadings should be liberally construed. Rules of Civil Procedure, Rule 8 (f); *U. S. Plywood Corp. v. Hudson Lumber Co.*, 17 FRD 258; *McKenzie v. Beidberg Rothchild Co.*, 12 FRD 392; *Consolidated Elec. v. Employers Mutual Ins. Co.*, 106 F.Supp. 322. The proof offered by appellant that there was no other applicable law giving a right of action for wrongful death was precisely within the allegations of its answer, and it was error to keep it out. Proof that there was no foreign law under which appellee could successfully claim was thus excluded.

Under the court's ruling, appellant was not allowed to ask whether the British Columbia court *would* apply the Families' Compensation Act were this case before it (R. 1030). Yet appellee in rebuttal was allowed to ask his expert, Mr. Cunningham, precisely the same thing in a long hypothetical question (R. 1061). The witness was allowed to answer even though the hypothetical question was not qualified by stating that the accident happened in British Columbia (R. 1065). During the cross-examination of Mr. Cunningham, appellant was again kept from asking if the act "would" apply (R. 1067). The conduct of the court in refusing to appellant the same opportunity to offer evidence as that given to appellee was both prejudicial and unjust. In addition, the court erred in allowing Mr. Cunningham to answer the improperly qualified hypothetical question.

In a further attempt to show that the Families' Compensation Act was the only applicable law, appellant

offered proof that only the legislature of British Columbia could deal in this field of property and civil rights even to the exclusion of the Dominion of Canada (R. 1037). The court misunderstood the inquiry, took over the questioning from counsel, and asked whether the British Columbia legislature had authority to enact the Families' Compensation Act—a fact which had never been in dispute (R. 1038). The court then sustained objections to further inquiry into the matter (R. 1039), and thereby once more prevented proof of the controlling foreign law.

Appellant further attempted to show that there was no applicable law of the Dominion of Canada, providing a right of action for wrongful death (R. 1037). The court again prevented the proof from coming in.

After keeping out all of this proof as to British Columbia and Canadian law, the district court decided the case on an entirely different theory from that upon which the case was pleaded and tried. Contrary to the pleadings, evidence, and prior adjudication of the Supreme Court of Washington, the court placed the accident *outside* of British Columbia, stated that the law outside of British Columbia had not been proved, and by presumption applied the Washington statute. After preventing appellant from proving the Canadian law, the district court found that such law was applicable and, because not proved, that *appellant* must suffer the consequences. The position taken by the district court was extremely unfair, especially in view of its statement made during the examination of Mr. Bird. The court said “... and it is not necessary to go into all this

long detail about what all the Canadian law provides” (R. 1038).

The court had an opportunity to correct this injustice when appellant, after the oral decision and again after judgment was entered, moved to amend its answer to set forth the law of Canada which would be applicable at the new place of the accident (R. 58, 106). Appellant also moved to reopen so that further testimony as to that law could be presented (R. 58, 106). But the court, having already made up its mind, summarily denied the motions, as well as the motion for a new trial (R. 106), and the travesty was complete.

Had any one of these errors not been made, a different result would have been reached, preventing recovery by appellee. Had the court found the accident happened in British Columbia as the pleadings, evidence, and prior adjudication required, the Families’ Compensation Act would have barred recovery by appellee. Had the court not misconstrued appellant’s pleadings, appellant would have shown the Families’ Compensation Act to be the only applicable statute under which appellee could have claimed. The same result would have followed had the court construed appellant’s pleading liberally, in accordance with the Rules of Civil Procedure and cases decided thereunder. Had the court permitted appellant to show that no statute of the Dominion of Canada created a right of action under which appellee could claim, regardless of where the accident happened, appellee could not have recovered. Had the court permitted appellant to ask Mr. Bird the same question appellee was allowed to ask Mr. Cunningham, the Families’ Compensation Act would have been shown to be the only applicable law. Had the court not

taken over from counsel the interrogation of Mr. Bird, and had it allowed appellant to pursue the interrogation, it would have been shown that the Dominion of Canada could not deal in the field of property and civil rights at the place of the accident. Had the court granted appellant's motion to amend and reopen, appellant would have proved that there was no law of Canada creating a right of action upon which appellee could base her claim.

All of these errors were prejudicial. Had any one of them not been made, proof of the applicable foreign law would have been introduced, thereby rendering resort to a presumption as to that foreign law unnecessary and inappropriate. Because of these errors, it was improper for the court to use the presumption and apply the Washington law.

5. The court erroneously applied the wrong foreign law presumption.

The general rule is that there is no presumption as to foreign statutory law. Section 623 of the Restatement of Conflict of Laws sets forth the general rule as follows:

“There is no presumption that the statutory law of another state is the same as that of the forum.”

It is only the common law of another common law jurisdiction, not its statutes, that can be presumed to be the same as the common law of the forum. Restatement of Conflict of Laws, Sec. 622. This is the federal rule and was laid down in the leading case of *Cuba Railroad v. Crosby*, *supra*. This presumption has been applied by both state and federal courts concerning the

common law of a foreign country as well as the common law of a sister state where the foreign jurisdiction's system of law is based on and derived from the common law. *Kingwell v. Hart*, 45 Wn.2d 401, 275 P.2d 431; *Cuba Railroad v. Crosby, supra*. Ordinarily a court will take judicial notice of the fact that a country's law is derived from the common law. *Cuba Railroad v. Crosby, supra*. It is not at all clear that such judicial notice may be taken of the laws of Canada, as its laws are based upon both the English common law and the French civil law. Nevertheless, such a presumption would not benefit appellee because the right of action for wrongful death that she asserts was, and is, unknown to the common law. *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193; 16 Am. Jur. 35. The district court was bound to follow the federal rule, and had it done so, judgment would have been entered in favor of appellant because of appellee's failure to prove the applicable foreign law. Instead, the district court allowed appellee to recover, stating in finding of fact 8 (R. 87-8): "No other applicable law having been adequately pleaded or proven, the law to be applied by this court to count 1 of plaintiff's complaint is the law of the State of Washington relative thereto." The federal rule was thus by-passed and, although applicable, was not invoked.

The district court's holding cannot be justified as an application of the rule laid down in the Washington cases either. It goes far beyond the liberal rule of presumption adopted by the Supreme Court of Washington. The Washington court has presumed that the provisions of a foreign statute, *shown to exist* but not

proved, were the same as the Washington statute on the same subject. Representative of such cases are *Gasaway v. Thomas*, 56 Wash. 77, 105 Pac. 168, and *Fletcher v. Murray Commercial Company*, 72 Wash. 525, 130 Pac. 1140. Ignoring the federal rule, appellee sought to extend and apply the Washington presumption rule, and the district court went along. In so doing appellant persuaded the court to indulge in three separate presumptions. First, a presumption that the laws of the foreign country are derived from the common law; in fact, the laws of Canada are derived from the civil law as well as the common law. Second, a presumption that the foreign country has deviated from the common law and has enacted a statute creating a right of action for wrongful death; in fact, no statute has been enacted by Canada that could furnish a basis for appellee's action (R. 60-72). Third, a presumption, even in the absence of proof that such a statute exists, that the provisions of such a statute are identical with those of the Washington statute; in fact, there was no statute similar to the Washington statute under which appellee could have claimed (R. 60-72). The Washington court has never gone this far.

By piling presumption upon presumption in this manner, an inflexible fiction is created which departs from and ignores the probabilities concerning the foreign law as it actually exists. As stated in 30 Mich. Law Review at page 760:

“Certainly the rule attains simplicity, but it seems to have done so at the expense of fairness. Moreover, it is difficult to support on the ground of reasonableness, for what logic can there be in sup-

posing that legislatures in various states and nations have enacted concordantly?"

Reduced to its simplest terms the district court has ruled that in the absence of proof of the foreign law that is controlling, the law of the forum will be applied even though in fact it has no application. This view of the rule has been severely criticized by Albert Kales, Professor, Northwestern University Law School, in 19 Harvard Law Review, at page 412 where he states:

"This second view seems not to rest upon any particular rational inference from the facts of which the court takes judicial notice. There is certainly nothing to warrant the court in saying there is any possibility that the law of a sister common law state is like the statutory law of the forum. How much less, then, is there any rational ground for supposing that the law of a foreign state, like Mexico or Chile, is like the statutory law of the forum of one of the states of the United States having a common law system of jurisprudence? The second view seems to rest upon the necessity of having a general rule so simple and unqualified that it may always be known who has the burden of going forward with the proof of the foreign law. From the point of certainty it may be admitted that it is a good rule. It is submitted, however, that it throws an unjust burden upon the one who has not naturally the burden of going forward with the evidence."

To appellant's knowledge, the Washington court has never departed so far from the general rule as to indulge in the three-step presumption when the existence of a foreign statute under which recovery could be based is not known and, in fact, does not exist. *Young*

v. Industrial Chemical Co., 2 WWR 468 (R. 61); Canada Shipping Act, Chapter 35, Statutes of Canada 1948 (R. 62-66); Admiralty Act, Chapter 31, Statutes of Canada, 1934 (R. 66-69). Mr. Bird testified concerning the admiralty court's jurisdiction and stated that it does not have jurisdiction over wrongful death actions involving aircraft, unless the death resulted from a collision between an aircraft and a vessel (R. 1040). He further stated, however, that if it did have jurisdiction, it could apply the Families' Compensation Act (R. 1041). *Le Val v. S. S. Giovanni Amendola*, *supra*. The Washington court has not presumed in any case that a right of action unknown to the common law exists in a foreign country and that the terms of a statute creating such a right are identical to a Washington statute. There is no Washington decision presuming the enactment by another jurisdiction of a wrongful death statute.

G. THE AMOUNT OF DAMAGES AWARDED WAS EXCESSIVE

Inasmuch as the district court granted recovery under the Washington wrongful death act, justification for the extremely high damage award must be found in the Washington law. The measure of damages in a wrongful death case is well stated in *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d 386, 261 P.2d 692, as follows:

“It is fundamental, in cases such as this, that the measure of damages is the pecuniary loss sustained by the beneficiaries for whose benefit the action is prosecuted.”

Punitive or exemplary damages are not recoverable

for wrongful death in Washington and cannot be a part of the damage award. *Longfellow v. Seattle*, 76 Wash. 509, 136 Pac. 855.

Appellant realizes that the amount of any award depends largely on the facts of the particular case. Nevertheless, decided cases do indicate generally what is reasonable and what is excessive. In *Hinton v. Carmody*, 182 Wash. 123, 45 P.2d 32, an award of \$5,000 to an infant child for the death of his 21 year old mother was held to be reasonable. In *Pearson v. Picht*, 184 Wash. 607, 52 P.2d 314, a damage award of \$1,500 to the widow of a 27 year old husband was found inadequate, and the appellant court increased the judgment to \$11,500. In *Cook v. Murphy*, 200 Wash. 234, 93 P.2d 376, an award of \$1,000 to the parent of a 21 year old girl earning ninety dollars a month was held to be reasonable.

A review of the evidence in this case will demonstrate that the award made by the district court was unreasonable and excessive. Finding of Fact No. 10 and what should be Finding of Fact No. 11, though unmarked (R. 88-90), are not supported by the evidence and are erroneous. There is no evidence that Waldrep ever intended to complete his schooling. On the contrary, the testimony of Leroy Waldrep, his father, clearly shows that he had no intention of completing his schooling. This witness stated that the highest grade his son completed was the ninth grade (R. 1100) and that thereafter he joined the Merchant Marine at the age of sixteen (R. 1083). After two years in the Merchant Marine Waldrep returned to his home in Alabama for a period of approximately six

months during which he worked for his father as a farm hand and was paid between fifteen and twenty dollars per week (R. 1085, 1086). He then joined the United States Marine Corps and served for two and one-half years at a pay ranging from ninety to one hundred dollars per month. He again returned home and stayed there for a period of six to eight months, attending night high school and working as an auto mechanic during the day. At this job his pay varied from twenty-five to thirty dollars per week (R. 1090, 1101, 1102). After this brief period at home, he again entered the military service in the fall of 1949. This time he selected the United States Army, enlisting for a four-year hitch (R. 1091, 1092). During this enlistment he met his death. It is a distortion of these facts to find that Waldrep had any intention whatsoever of completing his schooling. On the contrary, it appears that Waldrep, after completing the ninth grade, quit school on two separate occasions to enter services of the United States for periods totalling eight and one-half years. There is no evidence to support this finding of the court.

Likewise, there is no evidence to support the findings that Waldrep attained the rank of sergeant first class, pay grade "E-6," or that his total pay and allowances exceeded three hundred dollars per month. Waldrep's father testified that as far as he knew Waldrep was a buck sergeant, but that he thought his son had a promotion coming up (R. 1103, 1104). He further stated that he did not know the amount of his son's monthly pay. Mrs. Bloth, Waldrep's sister-in-law, testified that Waldrep had attained the rank of sergeant first class (R. 431), but was not asked how she knew this fact or

whether or not she was testifying from personal knowledge. She did not testify how she obtained this information. She admitted on cross examination that at the time of Waldrep's marriage—less than one year before his death—he was a corporal (R. 401, 474). The only other evidence on the point is contained in the Air Passenger Manifest (Def. Ex. A-20) for Flight 324 upon which Waldrep met his death. There Waldrep is listed only as "SGT" while those passengers who had attained the rank of sergeant first class were designated as "SFC." Richard P. Field, one of the survivors, testified by deposition at the trial. He testified that he was a sergeant first class (R. 1153). On the Air Passenger Manifest he is so listed by the abbreviation "SFC." The evidence, then, on this issue is this: Waldrep's father testified that the deceased was a buck sergeant; the Air Passenger Manifest, prepared by the U. S. Government and delivered to appellant on January 17, 1952, at the time Flight 324 departed from Tokyo, listed him as a sergeant only and not as a sergeant first class. Mrs. Bloth stated, on the other hand, that he was a sergeant first class. Mrs. Bloth did not testify that this information came from Waldrep, and the strong probabilities are that it did not (R. 474). If it came from other sources, such testimony would be hearsay and not entitled to consideration. Certainly little, if any, weight can be attached to it. The court's finding is not supported by any substantial evidence, and the evidence preponderates against such finding. The credible and preponderating evidence is that Waldrep was a buck sergeant.

It was stipulated between counsel during the trial that a sergeant first class has a pay grade "E-6," and a

buck sergeant a pay grade “E-4” (R. 662). At the time of Waldrep’s death he was receiving pay and allowances as prescribed by the Career Compensation Act of 1949, Chapter 681, 63 Stat. 802. According to said statute Waldrep, with over four but under six years of accumulative service in the uniformed services of the United States was entitled, if a buck sergeant (pay grade E-4), to receive each month a base pay of \$132.30, foreign duty pay of \$13.00, and a quarters allowance for his dependents of \$45. If he was a buck sergeant (pay grade E-4) then his total monthly pay amounted to \$190.30.

If Waldrep was a sergeant first class (pay grade “E-6”), he would have been receiving a base pay of \$176.40, foreign duty pay of \$20.00, and an allowance for quarters of \$67.50, a total of \$263.90 per month. The court’s finding that Waldrep was receiving in excess of \$300.00 each month is clearly erroneous, regardless of the pay grade attained, is totally unsupported by any evidence and is contrary to the Career Compensation Act of 1949, Chapter 681, 63 Stat. 802, *supra*, then in effect.

The District Court’s finding that it was likely that Waldrep would be “in the future amply able to provide suitable, expensive, and valuable support, care and education for his minor daughter . . .” (R. 89) is likewise unsupported by any evidence. There is no evidence that he was other than a normal, healthy man, apparently making a career in the military service of the United States. The court should have found that Waldrep was likely to have provided in the future such

support, care, and education for his minor daughter as his military income would have permitted.

The record likewise does not support the court's sentimental finding that the child is intelligent, has bright prospects for future accomplishment, and is gifted (R. 89). Mrs. Bloth admitted on cross examination that there was no objective basis for her testimony on direct examination that Judith Ann had any special musical or artistic talent (R. 474-476). Mrs. Bloth also acknowledged that she herself did not sing or play a musical instrument (R. 474). She revealed no training or educational background entitling her to express an opinion with respect to the ability and capacity of this child. Mrs. Bloth admitted that she based her judgment of the child's musical talent on her own observation of the child only (R. 475) and not by a comparison of the child with other children of similar age. Although Mrs. Bloth testified that Judith Ann had more than average mentality (R. 440), again this was based on her, Mrs. Bloth's, personal and inexperienced opinion, not on an intelligence test or upon the judgment of persons skilled in the testing and measurement of intellectual capacity (R. 477).

There was absolutely no evidence from which even an inference could be drawn that Waldrep could have provided the sums of money necessary to support the child in the extravagant fashion Mrs. Bloth, her aunt, would now like to provide for her at appellant's expense. Insofar as the child is entitled to recovery for the money support that she lost because of her father's death, her damage can be measured only by the amount that Waldrep reasonably could have contributed for

her support, and not by the amount that someone else thinks that desirable things in addition to support will cost. It is solely a matter of how much Waldrep could reasonably have been expected to contribute, whether this is much or little. The evidence shows that Waldrep had made an allotment to his wife of \$70 per month (R. 431) and also sent her some additional money (R. 432). The testimony of Mrs. Bloth relating to how much it would cost her to take care of Judith Ann and to give her the same things she gives to her own children should not have come into evidence or have been considered by the court in awarding damages. It should be observed that Mrs. Bloth's testimony was both vague and speculative. The district court recognized that her cost of support estimates were her own opinion only and not binding on the court (R. 426, 427). She testified that she estimated it would cost one hundred dollars each month to give Judith Ann the things that her own children received, until Judith Ann reached the age of six and one-half years and started to school. Mrs. Bloth estimated that during the grammar school years the cost of supporting Judith Ann would be increased 50 per cent to \$150.00 per month. Mrs. Bloth testified that at the high school level (R. 427) it will require \$200.00 per month to support Judith Ann (R. 428). When, on cross-examination, Mrs. Bloth was asked to substantiate these estimates, she was unable to do so (R. 443-450). She could not satisfactorily explain the increase in the monthly amounts needed when the child enters grammar school and high school. To account for the fifty dollar per month increase when the child enters grammar school, Mrs. Bloth stated only

a need for more clothing and for transportation to school (R. 460). To justify the second fifty dollar per month increase upon entering high school, Mrs. Bloth, although conceding that the cost of transportation to school would be reduced (R. 463), cited the need for still more clothing, transportation to sports events up to 400 miles away (R. 462), and such luxuries as thirty-five dollar cheerleading sweaters and several twenty-five dollar cheerleading outfits (R. 463). Mrs. Bloth's testimony in this regard is vague, speculative, fanciful, and entitled to little or no weight.

There was other testimony of Mrs. Bloth, however, that was considerably more revealing as to the amounts actually required. On cross-examination she was asked to estimate the basic costs incurred since October, 1956, when she, her husband, their five- and sixteen-year-old girls, their two grandparents and Judith Ann were all living together in Mrs. Bloth's home. She estimated that it cost each month \$225.00 for food, \$75.00 for utilities, \$111.00 for house payment, \$25.00 for medical expenses, and \$60.00 for clothing, a total of \$496.00 each month (R. 448, 449, 450). If this amount were divided by the seven people living in the house and receiving the benefit of this monthly expenditure, the amount expended per person would be about \$71.00 per month. This testimony of Mrs. Bloth is more reliable because it is based upon her own actual monthly outlay to maintain the home and care for those living in the home. This sum for the monthly support of Judith is an amount which the deceased, had he lived, reasonably could have been expected to provide.

To illustrate that the damage award of \$40,000.00 is excessive in this case, it must be translated into a monthly income for Judith Ann. Using the standard 4 per cent discount table, \$40,000.00 would provide Judith Ann with an income of \$230.00 per month for twenty-one years. This is far more than Sgt. Waldrep reasonably would have been able to provide for his daughter had he lived and more than three times the allotment he had been making to his wife. It even exceeds by \$30.00 per month Mrs. Bloth's rash guess of the cost of providing Judith Ann during the high school years with support plus luxuries. Mrs. Bloth also estimated \$100.00 per month to age 7 and \$150.00 to age 14 for Judith Ann.

Seventy-one dollars per month is Judith Ann's share of the actual cost of supporting the seven members of the Bloth household. Annually the cost of her support amounts to \$852.00. According to the 4 per cent discount table, it would require a lump sum award of \$12,430.70 to provide an income of \$71.00 for twenty-one years. This is a far more realistic figure in view of the decedent's earnings.

In *Gulf and S.I.R. Co. v. Boone*, 120 Miss. 633, 82 So. 335 (1919) the court reduced a verdict of \$30,000.00 for the wrongful death of a soldier, 21 years of age, to \$20,000.00 on the ground that the verdict was excessive. In *Thompson v. Seattle*, 42 Wn.2d 53, 253 P.2d 625, the award for the wrongful death of a married man to his surviving widow, three minor children and an unborn child totaled \$39,191.75. The award was segregated among the beneficiaries. The sum allocated to the unborn child was \$5,805.00.

From this view of the evidence, an award of \$40,000.00, even though it includes damages for loss of parental care and guidance, is manifestly excessive. Instead of fair compensation for pecuniary loss sustained, the damage award in this case is in the nature of a penalty.

H. COST OF UNNECESSARY PORTION OF TRANSCRIPT AND RECORD SHOULD BE TAXED AGAINST APPELLEE

If appellant is successful in this appeal, costs in this court and the district could should be taxed against appellee. Regardless of the outcome of this appeal, however, part of the cost of the district court reporter's typewritten transcript and of the printed record in this court should be taxed against appellee. Although requested to do so by appellant (R. 119-121), appellee refused to stipulate that the testimony of certain witnesses was unnecessary and unessential to the issues on appeal. Appellant was thereby required to produce such testimony in full. Appellant offered to stipulate that the testimony of witnesses Peterson, Pitcher, Opsahl, Smith, Lewis, Kavanaugh, Hewitt, Thompson, Whittle, and Kingston was not material to the issues on appeal and need not be included in the transcript or printed record (R. 125-126). Appellee, although so stipulating as to other witnesses (R. 112) refused to stipulate as to these witnesses (R. 122) and required that their testimony be included. The testimony of these witnesses in no way bears upon the issues before the court on this appeal. Their testimony related solely to the issue of negligence. Appellant has not appealed

from the district court's findings with respect to that issue, rendering such testimony unnecessary and unessential to this appeal. Under Rule 75e of Federal Rules of Civil Procedure and Rule 17(6) of Rules of the Court of Appeals, Ninth Circuit, the cost of including such testimony should be taxed against appellee. *Associated Indemnity Corp. v. Manning* (CCA-9) 107 F.2d 362; *U.S. v. Vanegas* (CCA-9) 216 F.2d 657; *Watson v. Button* (CCA-9) 235 F.2d 235; *In re Joshua Hendy*, 2FRD 244; *Washington Coca-Cola v. Tawney*, 233 F.2d 353.

Testimony of these witnesses consumed 282 pages of the 1,095-page transcript, the total cost of which was \$932.50. The proportionate cost of transcribing the testimony of these witnesses is \$240.15.

Such testimony consumed 245 pages of the 1,165-page printed record, the total cost of which was \$3,155.16. The proportionate cost of printing the testimony of the witnesses is \$663.53. Accordingly, regardless of the outcome of this appeal, costs of at least \$903.68 should be taxed against appellee.

VI.

CONCLUSION

Appellee brought this negligence action against appellant claiming damages for the death of John M. Waldrep. At common law no such right of action existed; therefore it is only under a statute creating such a right of action that appellee's claim can be sustained. In her complaint, appellee pleaded the Washington wrongful death act, and she has claimed throughout

under the Washington act only. The accident in which Waldrep met his death did not occur in the State of Washington, however. The Washington wrongful death act has no extraterritorial force and cannot be applied where the injury resulting in death was inflicted in another jurisdiction. No cause of action arose under the Washington act, and appellee has no claim under it.

It was flagrant error for the district court to deny appellant judgment under its twelfth affirmative defense. The district court based its denial of the affirmative defense upon the crucial finding of fact that the accident happened more than "a half mile out seaward from low water mark" and therefore not within British Columbia jurisdiction.

Appellee alleged in her complaint and appellant admitted in its answer that the accident happened in British Columbia. This was the basis upon which the case was prepared. This was the basis upon which the case was tried. It was an agreed fact in the case. No proof to the contrary was offered by either party, and any such proof would have been inappropriate.

Furthermore, the fact that the accident happened in British Columbia had been previously established by the Supreme Court of Washington in a prior case between the same parties concerning the same accident. The parties were foreclosed from relitigating that fact.

This finding was erroneous because it is completely unsupported by and is contrary to all the evidence on the point. Both Mr. Bird and Mr. Cunningham, the British Columbia lawyers, agreed that the coastal boundaries of British Columbia extend at least to low

water mark, making the area between shore and low water mark a part of the Province of British Columbia. The only evidence placing the accident with reference to low water mark was the testimony of Mr. Leonard and Mr. Kildahl. Mr. Leonard, who investigated the accident in January, 1952, and again in June, 1952, testified that in January, 1952, he observed the efforts made to tow the aircraft; that the total amount of movement in all directions was not more than one hundred feet; and that at the conclusion of the towing the aircraft was no nearer shore than before. Mr. Leonard testified further that on June 9, 1952, he walked out to the airplane; that it was substantially buried in the sand; that it appeared to be in exactly the same position it had been in January on the day after the accident; that it was completely out of the water at low tide; and that the tidal edge of the water at low tide was at least seventy-five feet seaward of the airplane.

Mr. Kildahl, the maritime navigation expert, then testified that on the occasion of June 9, 1952, when Mr. Leonard walked out to the airplane, the low tide was 1.1 feet above zero tide and that zero tide is low water mark. In other words, low water mark was yet some distance seaward of the tidal edge of the water on that occasion. The combined testimony of Mr. Leonard and Mr. Kildahl established, in the absence of evidence to the contrary, that the aircraft came to rest landward of low water mark and within the territory of British Columbia. There was no evidence to the contrary. No other testimony was presented to the court placing the accident with reference to low water mark. Wit-

nesses Maynard, Baker, Field, Cox, and Sanders placed the aircraft anywhere from one-half to one mile from shore. The testimony of these witnesses was in no way related by their own or any other testimony to low water mark. The district court could have found from the evidence that the accident occurred at a given distance from shore, perhaps, but such finding could not justify finding No. 2 that the accident happened more than one-half mile seaward from low water mark. The district court's finding is totally unsupported by any evidence. The indicated finding from the evidence should have been: that the accident happened *landward* of low water mark in the Province of British Columbia.

Under the well-established and controlling conflict of laws rule following in this country, the law of the place of the tort should be applied in a wrongful death action. The tort is deemed to have been committed at the place where the injury causing death is inflicted. Under the admitted facts of this case the British Columbia law would control the rights of the parties.

The only British Columbia statute creating a right of action for wrongful death is the Families' Compensation Act. That Act contains a time limitation of one year within which an action must be brought. This provision is substantive and must govern no matter where the action is commenced. Because it was not commenced within one year from the date of Waldrep's death, appellee's action was barred. The court should have ruled: that the British Columbia Families' Compensation Act is applicable and governs the rights of the parties hereto; that appellee failed to commence its action within

the time limit set forth in Sec. 5 of the British Columbia Families' Compensation Act, which is a bar to her cause of action.

The Washington wrongful death act is not a basis for recovery by appellee. The law of the place of the tort controls, and it is undisputed that this place was not in Washington. The accident and tort took place either in British Columbia as appellant contends, or Canada, as the district court found. The Washington act cannot apply in this case because it has no extra-territorial effect and cannot apply to a death caused by injuries inflicted outside the State of Washington.

Appellee did not plead or prove any foreign law; furthermore, she did not rely on the foreign law. It follows then that this is not a proper case for the application of any presumption regarding the foreign law. From the beginning appellee has relied entirely on the Washington death act which she alleged in her complaint. Having relied on and having claimed under no foreign law as the basis for her wrongful death action, she has not made either the existence or content of the foreign law an issue in her case. Accordingly, there is no room for the application of any presumption relating to that foreign law. Appellee should be estopped from claiming under a foreign law by way of a presumption as to its contents. She is attempting to take a position inconsistent with her previous assertion of rights under the Washington law, upon which assertion appellant has justifiably relied.

Appellant on the other hand in its affirmative defense XII pleaded, as a bar only, the law applicable at

the place where appellee alleged the accident had occurred. No presumption is applicable to the foreign (British Columbia) law pleaded by appellant in defense because such law was actually proved by appellant.

Under the federal rule presumptions relating to the law of a foreign country encompass only the common laws of foreign countries the jurisprudence of which is based upon the common law. There is no presumption that a statute of a foreign country is identical to the statute of the forum. The Washington court, however, has departed somewhat from this rule and has on occasion presumed that a foreign statute is the same as a Washington statute on the subject. Appellee seeks to extend the presumption to include more than just the terms and provisions of a known foreign statute. Appellee also wants the court to presume that a statute on the subject has been enacted by a foreign country and is in force. Appellant is aware of no Washington decision that has gone that far. The federal rule is binding on the district court, and it was error for the court to have permitted appellee to recover on the premise that the Washington death statute applied, "no other applicable law having been pleaded or proved."

The district court erroneously refused to allow appellant to introduce evidence which, if admitted, would have rebutted any such presumption. Appellant, in support of its affirmative defense based upon the British Columbia statute of limitations contained in the British Columbia Families' Compensation Act, sought to show through Mr. Bird that there was no other

statute under which appellee could claim. Appellant was within its pleading in seeking to introduce such testimony. Had it come in, it would have established that there was no statute other than the Families' Compensation Act, in either British Columbia or the Dominion of Canada, creating a right of action for wrongful death under which appellee could claim. The exclusion of such testimony was error; its admission would have destroyed any such presumption. Furthermore, after the district court rendered its decision and found that the accident did not happen in British Columbia, appellant sought permission to amend its affirmative defense to plead the non-existence of any applicable wrongful death act in the jurisdiction in which the court found the accident did happen and to submit proof thereof. Again, the presumption would have been eliminated if appellant had been permitted to introduce such proof. Because the court's finding changed the place of the accident from that agreed upon in the pleadings and from that fixed by prior adjudication, it was an abuse of discretion to deny the amendment and proof.

The damage award to appellee was unreasonably high and excessive. The \$40,000.00 awarded would provide a monthly income for the next 21 years far in excess of the amount Waldrep, a soldier, could reasonably have been expected to provide. In fact the award will yield a monthly revenue for 21 years of \$230, which is in excess of Waldrep's military income including base pay, foreign duty pay and quarters allowance. Such an income would also be far in excess of the monthly amount

actually spent for the care of the child since her birth, and far in excess of Mrs. Bloth's indulgent estimate of the cost of the child's support.

The district court should have found, and should now be directed to find, that the accident happened in British Columbia; that the British Columbia Families' Compensation Act applied; that appellee's action was barred because not commenced within the time provided for therein; and that appellee failed to plead or prove any applicable law under which a wrongful death action could be maintained. The court should have concluded, and should now be directed to conclude, that the Washington wrongful death act was not applicable and that appellee failed to state a claim under Count 1 of its complaint under which relief can be granted. Judgment of dismissal of plaintiff's complaint should have been, and should now be, entered, and costs in both courts taxed against appellee.

Regardless of the outcome of this appeal, however, appellee should be taxed with the cost of producing the unnecessary portions of the transcript and printed record which appellant sought to exclude by stipulation.

Respectfully submitted,

KARR, TUTTLE & CAMPBELL,
CARL G. KOCH,
COLEMAN P. HALL,
Attorneys for Appellant.

APPENDIX

Plaintiff's Exhibits

| <i>Pl. Ex.</i> | <i>Identified</i> | <i>Offered</i> | <i>Admitted</i> | <i>Rejected</i> |
|----------------|-------------------|----------------|-----------------|-----------------------------------|
| 1 | 519-520 | 519 | | 521-523 |
| 6 | 501 | 500 | 504 | |
| 7 | 679 | 679 | 679 | |
| 8 | 679 | 679 | 679 | |
| 9 | 682 | 682 | 682 | |
| 12 | 241 | 243 | 243 | |
| 13 | 257 | 257 | 257 | |
| 14 | 347 | 347 | 367 | |
| 15 | 384 | 386 | 386 | |
| 16 | 399 | 401 | 404 | |
| 17 | 406 | 406 | 406 | |
| 18 | 407 | 407 | 408 | |
| 19 | 408 | 408 | | 409 (rejected) (withdrawn) |
| 20 | 435 | 435 | 436 | |
| 21 | 543, 621 | 621 | 621 | |
| 22 | 542 | 543-544 | 544 | |
| 23 | 543, 582 | 582 | 584 | |
| 24 | 548-549 | 549 | 549 | |
| 25 | 550 | 579 | 579 | |
| 26 | 559 | 561 | | 561 (rejected) 791 (withdrawn) |
| 27 | 580-581 | 585 | 588 | |
| 28 | 625-626 | 627 | | 791 (withdrawn) |
| 29 | 630-631 | 633 | 637 | |
| 30 | 638 | 638 | 639 | |
| 31 | 656, 658 | 659 | 659 | |
| 32 | 660 | 660 | | 683 (withdrawn) |
| 33 | 658, 660-661 | 661 | 661 | |
| 34 | 674-675 | 675, 681 | | 682 |
| 35 | 676 | 681 | 681 | |
| 36 | 680 | 680 | 681 | |
| 37 | 798 | 799 | | 800 |
| 38 | 800 | 801 | 802 | |
| 39 | 1001-1002 | | | 1002 (withdrawn) |

Defendant's Exhibits

| <i>Dej. Ex.</i> | <i>Identified</i> | <i>Offered</i> | <i>Admitted</i> | <i>Rejected</i> |
|-----------------|-------------------|----------------|-----------------|-----------------|
| A-3 | 593 | 593 | 593 | |
| A-5 | 503-504 | 503 | 504 | |
| A-15 | 302 | 303 | 303 | |
| A-16 | 221 | 221 | 221 | |
| A-17 | 263 | 264 | 1014 | |
| A-18 | 538 | 539 | 539 | |
| A-19 | 700 | 700 | 701 | |
| A-20 | 703 | 704 | 704 | |
| A-21 | 703 | 704 | 704 | |
| A-22 | 708 | 708 | 708 | |
| A-23 | 754 | 756 | 757 | |
| A-24 | 766 | 766 | 766 | |
| A-25 | 768-771 | 769 | 771 | |
| A-26 | 771-772 | 772 | 772 | |
| A-27 | 775 | 775 | | 776 |
| A-28 | 773 | 773 | | 774 |
| A-29 | 777-779 | 779 | 779 | |
| A-30 | 778-779 | 779 | 779 | |
| A-31 | 862-863 | 863 | 863 | |
| A-32 | 865 | 866 | 866 | |
| A-33 | 866 | 866 | 866 | |
| A-34 | 866 | 867 | 867 | |
| A-35 | 905-906 | 907 | 907 | |
| A-36 | 872-873 | | | 878 (withdrawn) |
| A-37 | 873-887 | 881 | | 888-889 |
| A-38 | 873-887 | 881 | | 888-889 |
| A-39 | 873-887 | 881 | | 888-889 |
| A-40 | 873-887 | 881 | | 888-889 |
| A-41 | 1016 | 1016-1018 | 1045 | |
| A-42 | 1026 | 1031 | 1033 | |
| A-43 | 1055 | 1055 | 1057 | |
| A-44 | 1052 | 1052 | | 1059 |

No. 15670

United States Court of Appeals
For the Ninth Circuit

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vs.

GERALDINE B. GORTER, as Administratrix of the Estate
of John M. Waldrep, Deceased, *Appellee*.

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NORTHERN DIVISION

.. HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

WILLIAMS, KINNEAR & SHARP

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United States Court of Appeals

For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant,*

vs.

GERALDINE B. GORTER, as Administratrix
of the Estate of John M. Waldrep, De-
ceased, *Appellee.*

No. 15670

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

I.

STATEMENT OF THE CASE

A. The Facts

This suit is a wrongful death action brought on behalf of a child for the death of her father. The child was born three days after her father's death, and orphaned a few months later by the death of her mother. The deceased was, at the time of his death, a Sgt. First Class (R. 410) in the United States Army, returning home from Korea on emergency leave to be with his ailing wife at the birth of the child.

While appellant has not chosen to appeal from the findings of fact pertaining to its negligent conduct, appellee submits that for a proper understanding of the issues involved, particularly the conflict of laws

issues, a more accurate and detailed statement of the case is required.

On January 17, 1952, one of appellant's Douglas DC-4 aircraft departed Tokyo for the United States on the return portion of a flight originating at Seattle, Washington (R. 655). The aircraft was carrying 40 U.S. soldiers home from Korea for emergency leaves (R. 141). It crashed in the waters of Hecate Strait, off shore of Sandspit airstrip, British Columbia. This airstrip is located on the tip of an island 60 miles west of the British Columbia mainland (R. 1027) and is designated by appellant for use as an emergency landing strip.

Sgt. Waldrep was one of 35 soldiers and crew members who perished in the sea by freezing or drowning after the crash. This tragic loss was the culmination of an almost unbelievable chain of negligent acts and omissions by appellant airline, occurring over a period of three months in three different countries and over the high seas. While each one of the negligent acts and omissions could alone have been the proximate cause of the deaths, the sum total of these acts and omissions is appalling.

On October 19, 1951, a stock clerk in appellant's shops, at Seattle, Washington, failed to record the elapsed engine hour time on the aircraft's No. 1 engine, after receiving the engine from another airline company. The engine failed, necessitating the abortive attempt at an emergency landing. At that time it exceeded the Civil Aeronautics Board allowable operating time by more than 225 hours (R. 600-1) and showed

a shocking history of increasingly excessive oil consumption and extra maintenance (Pl. Ex. 30) (R. 639). Time and time again, in Seattle prior to departure, in Tokyo when picking up the soldiers, at Shemya, Alaska, where a magneto on the No. 1 engine had to be changed, and at the Anchorage Air Force Base, where the oil consumption between Shemya and Anchorage was shown to be increasing alarmingly (Pl. Ex. 30) (R. 597, 639), an alert inspector would have predicted its eventual failure. Apparently, however, no one gave it any thought until after the crash.

On January 17, 1952, appellant's personnel in Seattle prepared the aircraft for its flight to Tokyo and return to Seattle (R. 251, 695). They placed an inadequate amount of emergency over-water safety literature on board the aircraft at Seattle. The literature showed the life rafts to be stored in a *different* location than *actually was the fact* (R. 85).

After the final stop at Anchorage, Alaska, the aircraft departed for the State of Washington. Three hours later, in the early hours of January 19, 1952, midway between Anchorage and Seattle, the overdue No. 1 engine failed. The pilot radioed Seattle for instructions. Appellant's dispatchers and flight controllers failed to instruct the pilot or consult with or advise the pilot concerning landing conditions at the airstrip at Sandspit, B.C. (R. 85). Appellant's agents in Seattle neglected to alert rescue facilities in the area that an emergency landing was being made in adverse weather conditions on a snow-covered emergency field with which the pilot was unfamiliar (R. 87). Two hours

later the aircraft reached the vicinity of the airstrip and the pilot made one pass at the field but misjudged the available runway length. He attempted to become airborne again on three engines but crashed into the water at least one-half mile offshore (R. 83-85). To that moment, no one of appellant's crew had even bothered to wake up the passengers and advise them that an emergency landing was to be made or that an emergency existed (R. 141, 161). No instructions were given at any time to the passengers concerning the location or use of life vests (R. 139, 148). Although all of the crew and passengers survived the actual impact and were able to climb out of the aircraft, only a few found life vests. No emergency lights or signal flares were available and even though the crew desperately attempted to launch life rafts, they were not able to get any out of the aircraft (R. 1130).

One by one, during the ensuing two hours of total darkness, while the aircraft slowly settled in the sea, the passengers and crew dropped off into the near freezing waters (R. 147-9). Finally an airstrip attendant, who had become concerned when the aircraft failed to return after its one pass, roused a nearby resident. With a small row boat and an outboard motor they eventually located the wreckage in the darkness from the shouts of the seven survivors (R. 149). The boat was too small to carry the seven survivors. By clinging to the gunwales of the boat for the time that it took to reach shore, seven men were eventually towed to safety (R. 150, 1133).

B. Appellee's Theory of Case

The foregoing facts originally presented an interesting conflict of laws problem. However, now that the pleading and the testimony thereon are in the record, the solution of this case and its proper consideration is clear. Appellee submits and will support in detail throughout the following pages of her brief, that the proper conclusion must be reached by the following analysis.

The court found that the location of this accident was in the sea beyond low water. Appellant failed to either plead or prove any law, foreign or otherwise, applicable at that location, merely pleading that two sections of an act entitled Families' Compensation Act "could" apply. The uncontroverted testimony was, however, that said Act was not applicable seaward of low water mark (R. 1042, 1065-6). Therefore the court following the Washington rules of burden of proof and presumption, presumed the law applicable at this location to be the same as the law of Washington.

However, even if the accident had happened landward of the low water mark, Mr. Cunningham, the Chairman of the Maritime Law Subsection of the Canadian Bar Association for British Columbia and a member of the Air Law Subsection for British Columbia for the Canadian Bar Association (R. 1061), testified that under the law of British Columbia, a tort is deemed to be committed where the negligent acts take place and not necessarily where the injury is received.

"The second reason is that even if the wrongful act or acts of negligence occurred above low

water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States.” (R. 1066)

The deceased was a United States citizen; the aircraft a United States aircraft; and the corporate aircraft carrier was domiciled in the United States. Furthermore, as the primary acts of negligence occurred in the State of Washington, to-wit: the stock clerk’s erroneous entry (R. 85), the placement of improper literature and inadequate safety equipment (R. 85), the Seattle radio operator’s failure to advise the pilot and alert air-sea rescue services when the plane was in an emergency condition (R. 85); and further, as the aircraft was based in Washington and the flight originated and was to terminate in Washington, the appellant’s maintenance facilities for its Western district (which includes Tokyo and the Territory of Alaska) are in Washington (R. 229), and furthermore, as the principal records and witnesses were in Washington, the suit was filed in Washington, and the Washington law would be applicable according to the British Columbia law.

Appellant has failed to sustain its burden to prove the application of any other law, foreign or otherwise, at the place of the accident. Hence a Washington court,

and in turn a federal district court in Washington, under such circumstances, must presume that the applicable law is the same as the Washington law.

II.

ARGUMENT IN SUPPORT OF JUDGMENT

A. Federal Courts Apply The Law of the Forum State As to Burden of Proof and Presumption

Evidently after appellant discovered it had failed in its burden to plead and prove either foreign law or the application thereof, it decided after the trial to rid itself of its failure by pushing the burden off to appellee. Thus, on appeal, appellant passes the buck, so to speak, and claims, contrary to the lower court's finding, that now appellee has the burden of proof of foreign law. Appellant asserted no such theory in its pleadings, by motion, nor during the trial, nor is such a position recognized in law.

Whatever appellant's reasons, it is clear that its theory is wrong. Appellant has failed to recognize in its argument, the rules of choice of law in the federal courts. Indeed, appellant founds its argument on a case, *Cuba Railroad v. Crosby*, 222 U.S. 473, 56 L.Ed. 744 (1912), which is not the federal law on the question of burden of proof and presumptions since the decision in *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The lower court found herein, as a matter of fact, that the aircraft crashed seaward of the low water mark offshore of British Columbia. The court further found that appellant failed to properly plead or prove any

law applicable at that point. Thereupon it looked to the Washington law. In the absence of proper pleading and proof of other applicable law by appellant the district court, following the Washington rule, presumed the law to be the same as the Washington law. This is the correct application of the principle of *Erie v. Tompkins*, *supra*. In that decision the court said:

“Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a state or by its highest court in a decision is not a matter of federal concern.” *Erie v. Tompkins*, 304 U.S. at 78.

Applying the *Erie* case, in *Sampson v. Channell*, 110 F.2d 754, 128 A.L.R. 394 (1st Cir., 1940), cert. denied, 310 U.S. 650, 60 S.Ct. 1099, 84 L.Ed. 1415, the court said:

“But under the *Tompkins* case the Massachusetts law must be determined by the state statutes and the common law as interpreted by the state courts, not by the federal court’s notion of ‘general law’.” (Massachusetts was the forum state.) *Sampson v. Channell*, 110 F.2d at 761.

Appellee will show by the following argument and authorities that the district court applied both the federal choice of law rule and Washington substantive rules of burden of proof and presumption properly.

Inasmuch as appellant has gone to such lengths to attempt to place this burden of proof of the law applicable at the point of the accident on appellee we must determine whether (1) the federal court is bound

to follow the state rules as to burden of proof and presumption of foreign law, and (2) what the state rule actually is as to burden of proof and the presumption.

The case of *Sampson v. Channell*, *supra*, is perhaps the landmark case dealing with the rule of *Erie v. Tompkins*, *supra*, as applied to presumption and burden of proof. In that case Judge Magruder explored the policy behind *Erie v. Tompkins*, *supra*, which is the necessity for reaching a uniform result between federal courts and the forum state. The court announced that the state court rule as to presumption and burden of proof must be applied by federal courts to reach the desired result of uniformity:

“Inquiry must be directed to whether a federal court in diversity of citizenship cases, must follow the applicable state rule as to incidents of burden of proof.” *Sampson v. Channell*, 110 F.2d at 754.

“... the state rule as to burden of proof must be applied in diversity of citizenship cases . . .” *Sampson v. Channell*, 110 F.2d at 758.

“Our conclusion is that the court below was bound to apply the law as to burden of proof as it would have been applied by the state courts in Massachusetts.” *Sampson v. Channell*, 110 F.2d at 762.

“Therefore, inasmuch as the *older decisions* in the federal courts, applying in diversity cases the federal rule as to burden of proof as a matter of ‘general law,’ are founded upon an assumption no longer valid since *Erie Railroad Co. v. Tompkins*, 204 U.S. 64, their classification as a matter of substance should be re-examined in the light of the objective and policy disclosed in the *Tompkins*

case.” *Sampson v. Channell*, 110 F.2d at 756. (Emphasis added)

Since *Erie v. Tompkins*, the 9th Circuit has repeatedly stated that a federal district court must apply the forum state’s law of burden of proof and presumption. Typical of the decisions are the following:

New York Life Insurance Co. v. Roger, 126 F.2d 784 (9th Cir., 1942) (State rule of burden of proving recovery under insurance policy applied);

Hagen v. Washington Water Power Company, 99 F.2d 614 (9th Cir., 1938) (State doctrine of *res ipsa loquitur* applied);

Equitable Assurance Society v. MacDonald, 96 F.2d 437 (9th Cir., 1938), cert. denied 305 U.S. 624, 83 L.Ed. 399 (Washington state rules of presumption and burden of proof as to fraudulent character of misrepresentations applied).

Since the *Erie* case the United States Supreme Court has repeatedly applied the same principle:

Bank of America National Trust & Savings Assn. v. Parnell, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956);

Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943);

Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 6 S.Ct. 20, 84 L.Ed. 196 (1939).

In other circuits the federal courts recognize the basic principles of federal and state conflict of laws. They have consistently applied the state rules of presumption of foreign law.

Sylvania Electric Products v. Barber, 228 F.2d 842 (2nd Cir., 1956), cert. denied, 350 U.S. 988, 76 S.Ct. 475, 100 L.Ed. 854 (1956). (Federal court presumed Nebraska presumption of knowledge of danger same as Massachusetts);

Krasnow v. Nat'l Airlines, 228 F.2d 326 (2nd Cir., 1955). (Federal court presumed Florida law on duty of common carriers to be same as New York rule);

Peterson v. Chicago Great Western Ry. Co., 138 F.2d 304 (8th Cir., 1943). (Iowa law presumed same as Nebraska);

Adams Hat Stores v. Lafco, 134 F.2d 101 (3rd Cir., 1943). (Federal court presumed laws of New Jersey and Delaware to be the same as Pennsylvania);

Waggaman v. General Finance Co., 116 F.2d 254 (3rd Cir., 1940). (Federal court presumed Maryland law, where accident happened, to be same as law of Pennsylvania);

F.A.R. Liquidating Corp. v. Brownell, 130 F. Supp. 691 (D.C. Del. 1955);

Molina v. Sovereign Company, 6 F.R.D. 385 (D.C. Neb. 1957).

These foregoing principles are overlooked by appellant. Appellant relies solely on *Cuba Railroad v. Crosby*, *supra*, attempting throughout its brief to cast this burden of pleading and proof on the appellee. The *Cuba Railroad* case, *supra*, is a pre-*Erie v. Tompkins* case, no longer in point on the issues involved herein.

B. The Law in the State of Washington Is That the Burden of Proving Foreign Law Is on the Litigant Asserting a Law Different from the Law of the Forum State

Appellant has cited no Washington cases in its brief to support its assumption that appellee has the burden of proof of a foreign law. The reason for this is, of course, that the Washington court has consistently held that the party asserting application of a law *different from* that of the forum has the burden of pleading and proving that law. One of the first Washington cases to consider this point, and a case consistently cited thereafter, is *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736 (1902). In that case the Supreme Court of Washington laid down the Washington rule emphatically that once the plaintiff has made out a *prima facie* case under Washington law, it is the burden of the defendant to assert by proper pleading and proof *any* foreign law relied on as a defense.

The defendant in *Clark v. Eltinge*, *supra*, urged exactly the same assertion to the Washington court as appellant asserts to this court. In fact, the Washington Supreme Court heard the case twice on the same issue because of the commission of the same error twice by the trial court. In the earlier decision and in the later decision, which is *Clark v. Eltinge*, 34 Wash. 323, 75 Pac. 866 (1904), the Washington Supreme Court ruled that the defendant, not the plaintiff, had the burden of pleading and proving the foreign law upon which it relied.

The case involved foreclosure of a Montana mortgage. Each of the two defendants claimed under Mon-

tana law the mortgage must be foreclosed and the proceeds applied upon the debt before the plaintiff stated a cause of action; and thus claimed it devolved upon plaintiff to plead and prove Montana law. The court said:

“ ‘The action itself was a simple one. In order to put the respondents upon the defense, *it was enough* for the appellants to allege and prove the making and delivery of the note, their ownership of it, the fact that the respondents were husband and wife, and that the debt was a community debt *under the laws of this state*. Whether the note had been paid, in whole or in part, *or whether there were other legal reasons why the appellants could not recover, were matters of defense, which respondents must allege and prove in order to avail themselves of them. It did not devolve upon the appellants to negative such defenses in advance of their assertion.*’

“We think the above language makes it clear, as the law of this case, that, when appellants had introduced their evidence, the nature of which conforms to the suggestions of this court, they were entitled to go to the jury. It was plainly stated that, when such proof was made, then, *if there were other legal reasons why recovery could not be had, they were matters of defense which respondents must allege and prove.*

“*Respondents are making the defense that resort must be had to the law of Montana to determine whether appellants may recover in this action.* As a part of the defense, they claim that, under that law, the mortgage must have been foreclosed and the proceeds of the security applied upon the debt, before this action can be main-

tained. They allege that this has not been done. *It is their duty to prove it, if they wish to avail themselves of it. As we said on the other appeal, they cannot require appellants to negative their defenses in advance of their assertion.*" *Clark v. Eltinge*, 34 Wash. at 328-30, 75 Pac. at 868. (Emphasis added)

The wife in the above case claimed as her separate defense that under Montana law, she was not responsible for the debts contracted by her husband who signed the note alone. The plaintiff pleaded and proved facts establishing a community debt *under Washington law*. The defendant wife did not allege or prove the appropriate Montana law to establish a defense. The court accordingly said:

"The question, then, is, did the proofs [by plaintiff] make a *prima facie* case against her? . . . Had the transaction occurred in this state, the debt, unquestionably, would have been a community debt of the husband and whether it be the community debt of the husband and wife, or the separate debt of the husband, must be determined . . . by the laws of Montana. But these laws are not before us. We must therefore presume them to be the same as our own . . ." *Clark v. Eltinge*, 29 Wash. at 222-23, 69 Pac. at 738.

"We think it properly devolves upon the respondent, who seeks to avail the presumption against her, to make that proof." *Clark v. Eltinge*, 34 Wash. at 328, 75 Pac. at 868.

The *Clark v. Eltinge* case, *supra*, has been consistently cited and relied on by the Washington Supreme Court from 1902 until the present. It stands for the

unimpeachable rule of Washington on the burden of pleading and proving foreign law and the consequences of failure.

Murrilla v. Guis, 51 Wash. 93, 98 Pac. 100 (1908) ;

Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1908) ;

Snyder v. Stringer, 116 Wash. 131, 198 Pac. 733 (1921).

Murrilla v. Guis, *supra*, affirmed on rehearing, 57 Wash. 564, 107 Pac. 378 (1910), is unquestionably in point. The facts are simplified as follows: Plaintiff, a woman, brought an action in a Washington court for seduction which took place in Alaska while both parties resided there. Plaintiff alleged only the fact showing the seduction and also the place of the wrong — Alaska. Plaintiff did not plead any Alaska statute granting a cause of action for seduction. A verdict for the plaintiff was appealed. As in this appeal, appellant argued that the appellee had the burden of pleading and proving an appropriate Alaska statute giving appellee a cause of action for seduction. The Washington Supreme Court held that it was not appellee's burden to plead or prove the Alaska law as a basis of her claim. No other law having been proved to the contrary by appellant, the court presumed the Alaska law to be the same as the Washington seduction statute.

Other Washington decisions following the rule that the party asserting application of a foreign law different from that of the forum, has the burden of pleading and proving that law are:

- Allen v. Saccomanns*, 40 Wn.2d 283, 242 P.2d 747 (1952) ;
- Archilles v. Hooper*, 40 Wn.2d 664, 245 P.2d 1005 (1952) ;
- Laughlin v. March*, 19 Wn.2d 874, 145 P.2d 549 (1944) ;
- Walnut Park Lumber & Coal Co. v. Roane*, 171 Wash. 362, 17 P.2d 896 (1933) ;
- Wamsley v. Rostad*, 150 Wash. 192, 272 Pac. 722 (1928) ;
- Tatum v. Marsh Mines Consolidated*, 108 Wash. 367, 184 Pac. 628 (1919) ;
- Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1915) ;
- Fletcher v. Murray Commercial Co.*, 72 Wash. 525, 130 Pac. 1140 (1913) ;
- Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (1910) ;
- Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634 (1910) ;
- Gasaway v. Thomas*, 56 Wash. 77, 105 Pac. 168 (1909) ;
- Mantle v. Dabney*, 44 Wash. 193, 87 Pac. 122 (1906) ;
- Daniel v. Gold Hill Mining Co.*, 28 Wash. 411, 68 Pac. 884 (1902) ;
- Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791 (1901) ;
- Lowry v. Moore*, 16 Wash. 476, 48 Pac. 238 (1897).

C. The District Court Properly Presumed the Foreign Law To Be the Same as the Statutory Law of Washington

Appellant asserts most vehemently that the “federal rule” is that there is no presumption that statutory law of a foreign country or state is the same as that of the forum (Appellant’s Brief 59-61), and again relies on the pre-*Erie v. Tompkins* case of *Cuba Railroad v. Crosby, supra*. As additional authority appellant quotes from the Restatement of Conflict of Laws, Section 623. Evidently appellant neglected to look to the Washington annotations to the Restatement. The Washington Annotations to Section 623 state:

“Sec. 623 Foreign Statutory Law:

“*Contra*. After a period of uncertainty . . . the court adopted the rule that the statutory law of another state will be presumed to be the same as that of this state in the absence of pleading and proof to the contrary.” (Citing cases on three pages.) American Law Institute, Restatement of the Conflict of Laws, Washington Annotations, Section 623.

The Washington decisions holding the courts will presume statutory law are too numerous to discuss in detail:

Walnut Park Lbr. & Coal Co. v. Roane, 171 Wash. 362, 17 P.2d 896 (1933);

Lino v. Hole, 159 Wash. 16, 291 Pac. 1079 (1930);

Rubin v. Dale, 156 Wash. 676, 288 Pac. 233 (1930);

Dailey v. Dailey, 154 Wash. 499, 282 Pac. 830 (1929);

- Bock v. Siefert*, 143 Wash. 4, 253 Pac. 1081 (1927) ;
- Williams v. Great Northern Railway Co.*, 108 Wash. 344, 184 Pac. 340 (1919) ;
- Tatum v. Marsh Mines Consolidated*, 108 Wash. 367, 184 Pac. 628 (1919) ;
- Freyman v. Day*, 108 Wash. 71, 182 Pac. 940 (1919) ;
- Marston v. Rue*, 92 Wash. 129, 159 Pac. 111 (1916) ;
- Plath v. Mullins*, 87 Wash. 403, 151 Pac. 811 (1915) ;
- German American Bank of Seattle v. Wright*, 85 Wash. 460, 148 Pac. 769 (1915) ;
- Fletcher v. Murray Commercial Co.*, 72 Wash. 525, 130 Pac. 1140 (1913) ;
- Canadian Bank of Commerce v. Sesnon Co.*, 68 Wash. 434, 123 Pac. 602 (1912) ;
- Sheppard v. Coeur d'Alene Lbr. Co.*, 62 Wash. 12, 112 Pac. 932 (1911) ;
- Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (1910) ;
- Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634 (1910) ;
- Gasaway v. Thomas*, 56 Wash. 77, 105 Pac. 168 (1909) ;
- Murrilla v. Guis*, 51 Wash. 93, 98 Pac. 100 (1908) ;
- Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505 (1908) ;

Mantle v. Dabney, 44 Wash. 193, 87 Pac. 122 (1906);

Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866 (1904);

James v. James, 35 Wash. 655, 77 Pac. 1082 (1904);

Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902);

Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884 (1902);

Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791 (1901).

See also:

Note, *Presumptions as to Foreign Law — Common Law & Statutory Law*, 5 Wash. L. Rev. 78 (1930).

Bearing in mind the well-recognized policy behind the *Erie v. Tompkins* rule, that is, that in diversity cases there shall be uniformity between the federal court and the particular state court wherein the suit is brought, the lower court recognized that the Washington rule as to presuming foreign statutory law is applicable herein.

Because the presumption of foreign law rule is a substantive conflict of laws rule, the possibility of non-uniformity between state and federal diversity actions, no longer exists since the case of *Klaxon Company v. Stenton Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1021, 85 L.Ed. 1477 (1941). In conformity with *Erie v. Tompkins*, *supra*, Mr. Justice Reed said:

“We are of the opinion that the prohibition de-

clared in *Erie Railroad v. Tompkins* [cite] against such independent determination by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those in Delaware state courts." *Klaxon v. Stenton Electric Company*, 313 U.S. at page 496.

Note also:

Alcaro v. Jean Jordeau, 138 F.2d 767 (3rd Cir., 1943).

For the reasons stated above, the question of probabilities warranting a presumption asserted by appellant is immaterial (Appellant's Brief 61-62). The Washington presumption rule is not dependent upon some abstract principle of probabilities. Clearly, it is a substantive rule of law, standing on its own right. The label "presumption" merely describes the effect of the rule. Since *Erie v. Tompkins*, federal courts will not judge the wisdom of state rules of law.

D. Washington Applies the Presumption to Foreign Country Statutory Law

Appellant erroneously claims the court cannot apply the presumption to the statutory laws of a foreign country such as Canada (Appellant's Brief 60). The simple answer to this contention is that Washington courts have presumed the laws of a foreign country, including British Columbia, to be the same as the laws of Washington, both common and statutory.

Dailey v. Dailey, 154 Wash. 499, 282 Pac. 830 (1929). (Statutory jurisdiction of divorce court in Mexico, presumed to be same as that of Washington);

Fletcher v. Murray Commercial Co., 72 Wash. 525, 130 Pac. 1140 (1913). (Bankruptcy law of China presumed to be the same as that of United States);

Pitt v. Little, 58 Wash. 355, 108 Pac. 941 (1910). (British Columbia law presumed to be the same as Washington Negotiable Instruments Act);

Gasaway v. Thomas, 56 Wash. 77, 105 Pac. 168 (1909). (British Columbia law of fixtures presumed to be same as Washington law);

Daniel v. Gold Hill Mining Co., 28 Wash. 411, 68 Pac. 884 (1902). (British Columbia corporations act presumed to contain no more than Washington act).

See also:

20 Am. Jur., Evidence, Sec. 181, Page 187, on the indulgence of the presumption to Canadian laws.

E. The Statutory Presumption Applies Whether or Not a Comparable Foreign Statute Is Shown to Exist

Appellant attempts to make an argument to the effect that the Washington presumption does not operate “unless the provisions of a foreign statute [are] shown to exist . . .” (Appellant’s Brief, 60--1, 62-3). In making the argument the appellant also asserts that a right of action, if any, would be unknown to common law at the place the death occurred. In such assertion appellant completely ignores the well recognized requirement that foreign law, or lack of it, is a fact, like any other fact, and must be proved in evidence. Thus,

if appellant had wished to rely on such argument it was obligatory on it to prove either or both of these two facts.

Appellant's reference to the Canadian case of *Young v. Industrial Chemical Co.*, 2 WWR 468, is extremely improper. Neither this case nor the statute cited thereafter were offered in evidence, or testified to for construction, or found as a fact. They were merely cited in appellant's proposed post-trial amendments (R. 61, 66-9) which were denied.

Thus to answer appellant's contentions, appellee would also assume facts not in evidence, which procedure appellee finds improper.

However, the simple answer to the argument that the foreign statute must be shown to exist before the presumption operates is simply to cite *Murrilla v. Guis*, *supra*, where the Washington court presumed Alaska law to be the same as the Washington statute providing a cause of action for seduction. Neither party in that action pleaded or proved an Alaska statute permitting an action for seduction. Regardless, the court said:

“It is maintained by appellant that, if such an action can be entertained by the courts of this state, it must be by authority of a statute where the offense was committed. The respondent did not plead a similar statute, or any statute, permitting such an action in Alaska, but she invokes the rule that, in the absence of proof to the contrary, the court will presume that the law of Alaska is the same as that of this state. In *Clark v. Eltinge* [cite] this court held that the above rule of pre-

sumption applies to statutory, as well as to common law. That decision is directly in point and is controlling here." *Murrilla v. Guis*, 51 Wash. at page 98, 98 Pac. at 102.

Besides the *Murrilla case*, there is a long list of decisions in Washington where the court presumed community property statutes, where *in fact* none were shown to exist in the foreign jurisdictions.

Lino v. Hole, 159 Wash. 16, 291 Pac. 1079 (1930);

Rubin v. Dale, 156 Wash. 676, 288 Pac. 233 (1930);

Marston v. Rue, 92 Wash. 129, 159 Pac. 111 (1916);

Plath v. Mullins, 87 Wash. 403, 151 Pac. 811 (1915);

Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634 (1910);

Mantle v. Dabney, 44 Wash. 193, 87 Pac. 122 (1906);

Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866 (1904);

Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902);

Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791 (1901).

Appellee agrees there is no Washington decision presuming the provision of a wrongful death statute, because the question has never arisen in the state. However, another jurisdiction has considered the question,

and made the presumption as to a wrongful death statute, under circumstances very similar to this case. Appellee respectfully invites the court's attention to the case of *Grow v. Oregon Short Line*, 44 Utah 160, 138 Pac. 398 (1913). In the *Grow* case, the plaintiff was injured and died in Idaho. Utah was the forum. Both Utah and Idaho had wrongful death acts. The plaintiff pleaded the Idaho act and defendant pleaded a later Idaho statute which was a defense to plaintiff's cause of action. Plaintiff then amended his complaint deleting reference to the Idaho act altogether. Defendant did not properly reassert its plea of defense in its new answer. Thus, the court was aware of the Idaho act and the defense; but since the Idaho act was not relied on by plaintiff or properly pleaded and proved in defense by defendant, the court granted plaintiff recovery under the Utah death act. The court presumed the Idaho act to be the same as that of the forum, in accordance with the proper rule.

F. The Application of the Presumption by the District Court Did Not Give the Washington Statute Extraterritorial Effect

The argument of appellant that wrongful death statutes have no extraterritorial effect (Appellant's Brief 40-5) is immaterial. The district court did not give the Washington statute extraterritorial effect. The court looked to the place of the injury, finding, under the evidence before it that the crash occurred seaward of low water mark, and then finding no law to the contrary

proved applicable, it presumed the law of that place to be the *same* as the Washington statute.

Assuming only for argument appellant's position that the evidence showed the accident happened landward of low water mark, the Washington law was still applicable. As Mr. Cunningham of the British Columbia Bar testified in rebuttal:

“The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States.” (R. 1066)

Under either state of facts the Washington law was applicable. This is not extraterritorial application.

The procedure followed by the lower court with respect to the presumption is precisely consistent with the Washington cases cited above, where the same immaterial argument was made to the Washington State Supreme Court. See *Murrilla v. Guis*, 51 Wash. at 98, 98 Pac. at 102. The procedure also is strictly in accord with the mandate of the United States Supreme Court, requiring federal application of the state rules of conflict of laws. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 618 S.Ct. 1021, 25 L.Ed. 1477 (1941).

III.

**REBUTTAL OF APPELLANT'S SPECIFICATIONS OF
ERRORS AND APPELLANT'S REMAINING
ARGUMENTS**

Appellant's specifications of errors and arguments appear to be directed primarily to the following points: (A) the court's finding that the accident occurred seaward of low water mark; (B) the court's finding that appellant failed to sustain its burden of proof; and (C) the court's finding as to damages and the amount of the judgment. In addition, appellant offers certain other arguments which are hardly worth extended rebuttal but are, nevertheless, discussed herein under the heading (D) Remaining Arguments of Appellant.

A. The Court's Finding That the Accident Occurred Seaward of Low Water Mark

Appellant presented its case and devoted the greater part of its brief to the question of whether the accident occurred seaward or landward of the low water mark. Mr. Cunningham testified that even if the accident had occurred landward of low water mark British Columbia courts would look to the place of the negligent acts and apply United States law. Furthermore, Mr. Cunningham's testimony was undisputed that the British Columbia Families' Compensation Act would not apply to an accident occurring seaward of low water mark (R. 1065-6). The court, however, made a finding that the accident occurred seaward of low water mark and appellant specifies this finding to be in error.

Appellant quotes the testimony of only one of its witnesses in support of its position that the accident

occurred landward (Appellant's Brief 23). That sole witness was Mr. Donald Leonard, who appellant introduces to this court as Regional Safety Engineering Chairman for the Airline Pilots Association (Appellant's Brief 22). Appellant neglects to mention that Mr. Leonard has been an employee of Northwest Airlines since 1944 and has been a Captain of Northwest Airlines about six years (R. 960-1). The portion of Mr. Leonard's testimony relied on by appellant pertains entirely to the location of the disintegrated airplane in June, 1952, after five months of heavy seas, tidal action and salvage towing operations (Appellant's Brief 23, 24). Even this witness testified that a few days after the accident, salvage operations were attempted by hooking onto the aircraft with some fishing boats (appellant misquotes his witness as testifying "a fishing boat," Appellant's Brief 24), and towing on it for approximately six hours (R. 993).

In support of the court's findings, appellee respectfully directs the court's attention to some of the testimony of other witnesses, who testified concerning the aircraft's location. For example:

(1) Mr. Dudley Cox, Manager of Flight Operations for appellant at the time of this accident reached the scene of the crash within 18 to 24 hours after the accident. He testified that:

"A. The fact that one life raft was protruding from the astradome of the aircraft, the top of the fuselage and could be seen as we *passed over the airplane in a boat in the water, could see the raft and was easily* identified, plus the fact that one of

the survivors at McChord General Hospital stated —” (R. 814) (Emphasis added)

Further:

“A. It appeared so, we observed the top of the fuselage. The tail section was torn off, we thought through a towing operation, *but we could see the top of the fuselage and the tops of the wings under the water.* It did appear from that view substantially intact.” (R. 647) (Emphasis added)

And also,

“A. We couldn’t state that positively. Some rafts were recovered. We saw one sticking out the navigator’s dome. That was there and it washed up on shore, to my knowledge. I found that one myself.

Q. How long after the crash did that wash up?

A. Three or four days.

Q. At that time, the aircraft had begun to disintegrate due to the tidal action and the weather, isn’t that correct?

A. That is correct.” (R. 667)

Mr. Cox testified that two or three days following the crash:

“ . . . There was a low tide at night and we did attempt to walk to the wreckage at that point. The CAB did not go out. They considered it too hazardous. Some of us did go out, tried to walk.

“ . . . it was at night. We attempted to get on board the wreckage. We could not do so.” (R. 636)

(2) Mr. Paul Sanders, a Director of Line Maintenance and ground services for Northwest Airlines on January 19, 1952, was immediately directed to the scene of the crash. He testified that:

“Q. Did you inspect the aircraft?

A. As much as was possible under the circumstances.

Q. Can you estimate how far the aircraft was located from the south end of the runway?

A. It is my guess, or my recollection, that the aircraft was . . . something in the vicinity of half a mile from the beach.

Q. From your investigation, had the aircraft withstood the impact of the water well?

A. Yes, I think it had.

Q. Was there or was there not substantial damage apparent?

A. Well, there was some fairly substantial damage apparent to the left wing of the aircraft, the left outer wing of the aircraft. There was some damage to the nose of the aircraft. Of course, during the ensuing three or four days, additional damage was done by the changing of the tide, but at the time, this is the damage that I recall. This was the day we arrived.

Q. Was any attempt made to tow the aircraft?

A. Prior to my arrival, apparently there had been an attempt made by some individuals on the scene to try—to attempt to beach the airplane by towing it around the point, so-called, Sandspit Point.” (R. 953-4)

He testified that as part of the investigation divers were used:

“Q. Was that observation confirmed or refuted by the inspection made by divers who went underwater?

A. Yes. Sometime during the ensuing week, we

secured the assistance of some RCAF, Royal Canadian Air Force divers, and at my direction one of these divers checked the two nacelles on the aircraft, and which the two main landing gears are stowed when they are retracted, and the observations there indicated that both of these landing gears were in the nacelles, in the up position.” (R. 856)

Mr. Sanders was one of the Northwest Airlines personnel who attempted to row around the aircraft to inspect the damage on January 21, 1952. They rendered a report as follows:

“Q. You testified that the aircraft when you flew over was in substantially good condition. You rendered a lengthy report after you returned from Sandspit and it was signed by you, do you recall that report?

A. The report was submitted to the CAB as part of our activities during the course of the investigation.

Q. Do you recall the statements set forth there, captioned Monday, January 21, 1952:

“ ‘Although the sea was running fairly heavy an observation crew consisting of Northwest Airline personnel, Mathews, Sanders, Cox, Leonard, a boatman and one member of the Royal Canadian Mounted Police rowed around the aircraft for a period of time in an attempt to observe the amount of damage to the aircraft. The aircraft by this time had broken into two separate pieces. The break occurred at a station immediately forward of the main entrance door. *The aft section had moved approximately 100 yards east of the forward section.* Not much else could be determined, and the party

returned to shore. During this time, another party while searching the beach at low tide found a complete nose wheel assembly had broken loose from the aircraft and had been washed up to where it was recoverable at low tide.'

"Do you recall that report?

A. That indicated the condition of the airplane on Monday." (R. 916-7) (Emphasis added)

Mr. Sanders' testimony is extremely interesting in connection with Mr. Leonard's testimony relied on by appellant. Mr. Leonard testified that from the appearance of the aircraft in June that it had not moved substantially, from the time of the accident in January. This, in spite of the facts of the many efforts to salvage the aircraft between the time of the accident and June, 1952, and in spite of Mr. Sanders' report and testimony that two days after the accident the aircraft broke in two and one part (the aft section) had *moved 100 yards away* from the other section.

(3) H. D. Maynard, one of the surviving passengers, and one who testified in person at the trial of the proceedings, stated that he and 6 other survivors of a total of 43 passengers and crew were rescued by a small boat which reached the scene of the crash and was able to tow the survivors to the shore. He testified that it took about 15 minutes to tow the survivors from the point of rescue to the shore by means of an outboard motor (R. 150). Lt. Donald Baker testified similarly.

(4) Richard Pontius Fields, the third surviving passenger testified that immediately after the crash:

"As I went out of the emergency hatch and upon reaching the outside I stepped off the back of the

starboard wing and went under water, and at that time I lost my life preserver. . . .

“I went under water above my head; how deep, I cannot determine.” (R. 1160)

The foregoing are but a few of the many, many pages of testimony and items which justified the court in finding that the accident occurred seaward of low water mark. It is submitted that this finding of fact is obviously justified under the circumstances and that the questionable testimony of Mr. Leonard, relied on by appellant, on page 23 of appellant's brief pertaining entirely to the appearance of the aircraft's remains in June, could never rebut the vast preponderance of evidence of many other witnesses, including the officers of appellant's own company.

B. The Court's Finding That Appellant Failed to Sustain Its Burden of Proof

Appellee has already argued in Part II of this brief that the court was correct in applying the Washington rules of burden of proof and presumptions, in view of the fact that appellant failed to sustain its burden of proof as to a foreign law as a defense.

Appellant's attack on the lower court's application of the Washington rules of burden of proof and presumption of statutory law appears to be primarily one of estoppel. Thus, under the main heading of “F. Presumption as to Foreign Law Is Not Basis for Recovery” (Appellant's Brief 48-59) appellant argues that appellee has never relied on any foreign law and therefore should be estopped from relying on any foreign law or presumption. The answer to this is, of course, that

appellee never relied on a foreign law as a basis for recovery except insofar as it may be presumed that the law at the place of the accident is the same as the Washington law.

Appellee is at a loss to understand the basis for appellant's unsupported statement that unless one *relies* on foreign law, the presumption does not operate (Appellant's Brief 49). Objective assertion and reliance is not required under Washington or *any* law. In fact, *not one* of the Washington Supreme Court cases, cited by appellee above, requires such a condition to the application of the presumption. There is no such rule.

The basis of any rule of estoppel is reliance and a change of position. Appellant was never misled. The very day after the crash appellant sent its own men to investigate every minute facet of what happened. Dudley S. Cox, Manager of Flight Operations, Paul H. Sanders, Assistant Manager of the Inspection Division, and Donald Leonard, Captain and pilot, all viewed the exact location of the aircraft in the water the next day (R. 630, 853, 964). They rowed around it, they searched the beach, they tried to salvage the plane, they knew every detail two years before this action was brought. Again, they returned in June, 1952, to search, investigate and learn why and where their aircraft ditched.

Bearing in mind the obligations of burden of proof inherent in the present case, it might be well at this point to show how and in what sequence the evidence was presented to the court at the trial. At the very outset appellee pleaded the Washington Wrongful Death Act, locating the accident at "less than a mile off

shore in the waters of Hecate Strait, British Columbia" (R. 5). At this time, appellant knew full well where the aircraft crashed, whether inside or outside low water mark. Appellee's allegation that the accident happened "off shore in the waters of Hecate Strait, British Columbia" (R. 5) was not a conclusive allegation of jurisdiction. It was a simple geographical reference for the sole purpose of identification. Indeed, appellee's requests for admissions (R. 37, 38) referred to by appellant (Appellant's Brief 17) established only that J. M. Waldrep was a "passenger," and he "died" in the crash.

In answer to the complaint, appellant denied the applicability of the Washington Wrongful Death Act, but pleaded no alternative law, foreign or otherwise. If appellant intended to rely on any law contrary to that of Washington it was its duty to set that out (*Clark v. Eltinge, supra, et seq.*). Having visited the scene of the crash, appellant knew where the crash took place. To say that appellee changed position and appellant was misled is untrue.

Again, two full years before trial, appellee filed a memorandum advising appellant not only that foreign law might apply, but warned that if appellant intended to claim a particular foreign law as a defense, proper pleading was necessary, or appellant must suffer the consequences. Appellee said in this memorandum:

"However, even if the court conceives that it should apply the law of British Columbia, Canada, this would not be ground for dismissal of Count I. The law of British Columbia, Canada, not being pleaded it is presumed that the law of British Co-

lumbia, Canada, is the same as the law of the State of Washington. This presumption goes as well to the statute law of Canada as it does to the common law.” (R. 21-2)

In addition to the above statement, appellee called appellant’s attention to four decisions in support thereof (R. 22).

Over three years after the complaint was filed, and two years after the above notice of appellee’s theory and intentions, and less than one month before trial, appellant amended its answer denying the applicability of the Washington Wrongful Death Act, alleging that the appellee “could” have brought its action under Sections 3 and 5 of the Families’ Compensation Act (R. 42-3, 45-7). In opposition to appellant’s pre-trial amendment once again appellee’s counsel reminded appellant of appellee’s intentions and theory of the case (R. 44):

“The plaintiff’s position was disclosed to the defendants over a year ago, as the records and file herein disclose, by memorandum of the plaintiff contra defendant’s Motion to Dismiss which called the court’s attention to the fact that defendant had not pleaded the British death act and that therefore the law of forum governs according to the well-known rules of law of this jurisdiction.” (R. 45)

Apparently appellant felt strongly that its only chance to prevail was to invoke the British Columbia Families’ Compensation Act, and that in order so to do it must positively identify the place of the crash as landward of low water mark. Thus on appellant’s case in chief it called a Mr. John Bird, a British Columbia lawyer to testify as to the applicability of Sections 3

and 5 of the Families' Compensation Act. He admitted that the Province of British Columbia extended to low water mark but that there is no judicial pronouncement as to the ownership of land between ordinary low water mark and a point three miles seaward (R. 1042). This witness was followed on appellant's case in chief by a Mr. Joseph M. Kildall, whose testimony was directed entirely to the question of where the low water mark was at this point. By the progression of its own testimony in its case in chief appellant was well aware that a necessary requirement for the applicability of the British Columbia Families' Compensation Act was that the accident must occur landward of low water mark.

Appellee offered one witness in rebuttal, Mr. Cunningham. In answer to the following hypothetical question, Mr. Cunningham gave the following answer:

“Q. I will ask you to assume that in January, 1952, a United States airplane operated by a United States corporation, Northwest Orient Airlines, Inc., pursuant to a contract with the United States Government, Department of the Air Force, left Japan with passengers for the United States, and after leaving Anchorage, Alaska, attempted to make an emergency landing at the airstrip at Sandspit, British Columbia, but instead crashed into open water at a point approximately one-half to three-quarters of a mile from shore; and ask you to assume further that one of the passengers, a United States citizen, died, leaving surviving a wife and an infant child; and assume further that the said death was caused by the wrongful act or acts of the carrier, Northwest Airlines, Inc.; and assume further that the administratrix of the de-

ceased's estate brought an action for and on behalf of the said child; do you have an opinion as to whether or not Sections 3 and 5 of the Families' Compensation Act of British Columbia would apply to this state of facts?

A. I have.

Q. What is that opinion?

A. The Witness: No, your Honor, my opinion is that the said Act would not be applicable." (R. 1061, *et seq.*)

Then again, at page 1066 of the record, Mr. Cunningham testified:

"The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States. Also—" (R. 1066)

Thus, at this point, the district court had no other law or laws contrary to the Washington Wrongful Death Act before it. Appellant had neither pleaded or proved, in relation to the place of injury, the application of any law as a fact, the application of no law as a fact, or the application of any fact sufficient to sustain its burden.

It is difficult, of course, to keep in mind that a "law"

(foreign) is “fact” because normally the two are separate in legal thinking. Thus, the normal meaning of the word “law” is apt to influence one’s thinking when an incongruous treatment is accorded it. This distinction that (foreign) “law” is treated as a simple “fact,” must constantly be reminded to one’s thinking to avoid subtle semantical confusion.

Thus, the district court had to follow the Washington rule and presume the law at the place of the crash to be the same as the Washington Wrongful Death Act.

“The question, then, is, did the proofs [by plaintiff] make a *prima facie* case against her? . . . whether it be the community debt of the husband and wife, or the separate debt of the husband, must be determined . . . by the laws of Montana. *But these laws are not before us. We must therefore presume them to be the same as our own . . .*” *Clark v. Eltinge*, 29 Wash. at 222-23, 69 Pac. at 738. (Emphasis added)

“We think it properly devolves upon the respondent, who seeks to avoid the presumption against her, to make that proof.” *Clark v. Eltinge*, 34 Wash. at 328, 75 Pac. at 868.

In support of its so-called estoppel and reliance theory, appellant places great reliance on the case of *Peterson v. Chicago Great Western Ry. Co.*, 138 F.2d 304 (8th Cir., 1943). Appellee has no criticism of this case. At the outset of its opinion, the court, affirming the judgment of a Federal District Court for the District of Nebraska, stated:

“Under the Nebraska conflict of laws rule, *lex loci delicti* governs generally the basic rights and

substantive incidents of actions brought in that state to recover damages for personal injuries sustained in another state. *If such foreign law is not pleaded and proved, however, the Nebraska courts, like most states, apply the presumption that it is the same as the law of Nebraska.*" *Peterson v. Chicago Great Western Ry. Co.*, 138 F.2d 305. (Emphasis added).

The court, recognizing the general rule, applied an Iowa statute to the facts because both parties by their pleading, trial memoranda, proof and instructions to the jury, relied on the statutes and laws of Iowa. It wasn't until the close of the case that the plaintiff changed his position and mentioned Nebraska (forum) law. In the instant case, however, the appellee consistently relied on the presumption of Washington law in its pleading, arguments, memoranda and proof. How can appellant seriously claim any surprise at this time? The other cases cited by appellant in support of its so-called estoppel theory (Appellant's Brief 53) are completely irrelevant and do not consider the matters at issue.

In assessing appellant's obligations and burden, the federal courts, following the *Erie* doctrine, will look to Washington court rules and attitude. Since 1894 Washington courts have constantly adhered to the principle of refusing to strain facts or law in aid of the defense of time limitations. The most recent reiteration of the Washington rule for assessing the burden of proof of one asserting such a technical defense is stated in *Wickwire v. Reard*, 37 Wn.2d 748, 226 P.2d 192 (1951) at page 759.

“Underlying our appraisal of the issues before us is the long-standing rule in this state that the statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it.” (Citing cases)

See also accord:

Cannavina v. Poston, 13 Wn.2d 182, 124 P.2d 787 (1942);

Bain v. Wallace, 167 Wash. 583, 10 P.2d 226 (1932);

Hein v. Forney, 164 Wash. 309, 2 P.2d 741, 78 A.L.R. 631 (1931);

Morgan v. Morgan, 10 Wash. 99, 38 Pac. 1054 (1894).

To give credence to appellant's argument would not only be contrary to law, but would be the very straining of interpretations condemned by the Washington court.

Even appellant's pleading as to foreign law was grossly insufficient. Besides asserting a defense that a foreign statute “could” be applicable (R. 46), appellant alleged no foreign decisions construing the statute, alleged no provisions relating to the facts of the case, set out only two sections of an act it relied on, and pleaded only appellant's own conclusions of its effect. At no time did appellant allege the Families' Compensation Act to be an exclusive remedy, or one under which the appellee must of necessity proceed.

Foreign law must be pleaded in all particulars so as to enable a court to judge its effect on the case at bar.

The City of Atlanta, 17 F.2d 311 (D.C. Ga. 1927);

Coronet Phosphate Co. v. United States Shipping Co., 260 Fed. 846 (S.D.N.Y. 1917);

Rodale v. Grimes, 211 Ga. 50, 84 S.E.2d 68 (1954);

Equitable Life Assur. Soc. v. Brandt, 240 Ala. 260, 198 So. 595 (1940).

41 Am. Jur., Pleading, Sec. 13.

As a required part of proper burden of pleading and proof, appellant must show the foreign law (whatever it is) governs the right of appellee, and that the act controls such right to the exclusion of all other law which might be applicable. The Families' Compensation Act was either exclusive or it was not; appellant either had a defense or did not. There is no "in between" position.

Appellant asserted by its own allegation "*could* have been based," that other laws might govern appellee's right of action; and, therefore, admitted the British Columbia Families' Compensation Act was not the sole and exclusive remedy upon which appellee could rely.

The applicable rule is stated in the *City of Atlanta* case, *supra*. Here a libelant pleaded in *haec verba* all the provisions of an alleged applicable Cuba statute. As in the present case, libelant did not allege whether the Cuba act covered the entire subject to the exclusion of the general maritime law. The court held:

"The obligation is on libelant, when he relies upon the law of a foreign country, where the supplies were furnished or the services rendered, to plead and prove such law . . . (citing cases). If such law was intended to cover the entire subject, to the exclusion of the General maritime law, it

should be so pleaded and proven.” *The City of Atlanta*, 17 F.2d at 311. See also, *MacCauley v. Hyde*, 114 Vt. 198, 42 A.2d 492 (1945).

Appellant pleaded only two sections of the British Columbia Families’ Compensation Act, Sections 3 and 5. All other sections for possible interpretation were omitted. All other law of Canada in construing or applying the Act was omitted. All other law of Canada or British Columbia relating to the place of the crash was omitted. Application of any law or an application of no law to the area seaward of low water mark was omitted. With none of these facts pleaded or proved, the district court properly resorted to the ordinary presumption.

Appellant alleged no facts to show appellee’s right of action came within the two sections of the Families’ Compensation Act appellant pleaded. It may be that the Act under British Columbia law was meant to apply only to residents of British Columbia injured in British Columbia, or only to residents of British Columbia injured from acts of negligence occurring in the province. It may be the Families’ Compensation Act under British Columbia law was meant only to govern actions brought in British Columbia courts, and not to govern rights of American citizens flying in American aircraft. As Mr. Cunningham testified in rebuttal:

“Even if the wrongful act or acts occurred in the air *or in British Columbia*, it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United

States, that the court in British Columbia would apply the law of the United States.” (R. 1066)

Appellant’s only allegation as to the legal effect of the Families’ Compensation Act was that the Act which “could” have been applied

“ . . . requires dismissal of plaintiff’s complaint for failure to state a cause of action, that said statute’s provisions bars this action.” (Amendment to Paragraph IX of Defendant’s Answer by interlineation) (R. 46)

This above statement of asserted effect was a mere conclusion of appellant’s opinion, not a fact showing the status and effect of the foreign law.

In *Coronet Phosphate Co. v. United States Shipping Co.*, 260 Fed. 846 (S.D.N.Y. 1917), involving certain restraints placed on shipments to Sweden and Holland by Great Britain and her allies, Judge Learned Hand stated:

“This allegation is certainly bad as it stands . . . *I do mean to say that in pleading foreign ordinances having the force of law the pleader is bound to allege more than his conclusion of the effects of the ordinance . . .*” *Coronet Phosphate Co. v. United States Shipping Co.*, 260 Fed. at 847. (Emphasis added)

“It is generally held that averring the pleader’s conclusions as to the legal effect of the foreign statutory law, is an improper manner of pleading it.” 134 A.L.R. 571 at p. 573. For other cases so holding see 134 A.L.R. at 574 and 580; 41 Am. Jur., Pleading, Sec. 15.

“The law is matter of fact, which must be pleaded with the certainty that any extrinsic fact must

be pleaded, which is essential to a right of action, or to constitute a defense. The pleader may be well satisfied of his construction of the foreign law, and may assert it as the law itself, that is not his province.” *Cubbedge, et al., v. Napier*, 62 Ala. 518 (1878)

C. The Court’s Finding as to Damages Was Obviously Justified

It is refreshing to find in appellant’s argument on this point that it recognizes the application of Washington law. In support of its argument, it then refers (Appellant’s Brief 63) to *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d 386, 261 P.2d 692 (1953), and states the rule to be:

“It is fundamental, in cases such as this, that the measure of damages is the pecuniary loss sustained by the beneficiaries for whose benefit the action is prosecuted.”

Characteristic of appellant’s argument, however, the quote is quite incomplete. In sustaining a \$50,000 verdict on behalf of a husband and a two and one-half-year-old child for the death of the wife, the court in the quoted case stated that a judgment for wrongful death may be said to be excessive under the following circumstances:

“ . . . the balancing factor is the conscience of the appellate court, when there is an affirmative showing that passion and prejudice played no part in the jury’s determination. Is the amount flagrantly outrageous and extravagant? . . .” *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d at 396.

In the same case the court states that in awarding damages to a minor child the trier of fact may

“ . . . take into consideration . . . the loss of ‘love, care, protection, services, guidance and moral and intellectual training and instruction’ suffered by him. . . . This loss may follow him beyond the period of minority.” *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d at 397.

And again, in the same case, the court wisely observed:

“ ‘We are also keenly cognizant of the fact that the purchasing power of money is less today than it was ten, fifteen, or twenty years ago.’

“ . . . in fact, the purchasing power of money is now considerably less than half what it was a few years ago.” *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d at 398.

Characteristically also the appellant attempts to cite and compare an award of \$1,000 to the parents of a 21-year-old girl as an authority (Appellant’s Brief 64). None of the cases cited by appellant, along with the obviously inapplicable case above referred to are comparable in either fact or time. Each was decided prior to 1939.

Cases on damages are legion. If for present purposes authority be needed to support the award a more comparable case would be *Boise-Payette Lumber Co. v. Larsen*, 214 F.2d 373 (9th Cir., 1954). In that case a \$75,000 verdict to a wife and surviving child was sustained.

The present case was tried to the court sitting without a jury. Obviously no claim of passion or prejudice can be made. The court saw the child, heard the wit-

nesses and particularly had the benefit of the aunt's testimony, in whose home the child resides. The court recognized that the child was deprived of a father's care, every vestige of support, paternal love, paternal guidance, paternal intellectual training and instruction, and all that fatherhood entails and means. What then is the "conscience of the appellate court?" *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d at 396. Is the amount "flagrantly outrageous and extravagant?" *Kramer v. Portland-Seattle Auto Freight*, 43 Wn.2d at 396. Or is the home a father could provide, support he could give, and his love, care and guidance well within the amount dispassionately found by the trial court. The answer is obvious. In no circumstance could the award be considered "flagrantly outrageous and extravagant" and patently, it is well within the "conscience of the court."

D. Remaining Arguments of Appellant

Appellant has brought up several points in argument throughout its brief which appellee feels are minor in nature and not worthy of extended argument.

1. Cost of Transcript

For example under the heading "Cost of Unnecessary Portion of Transcript and Record Should Be Taxed Against Appellee" (Appellant's Brief 72) appellant argues that appellee should be taxed costs of \$903.68 for refusal to stipulate to the exclusion of testimony of certain witnesses. The testimony of these witnesses related to the acts of negligence and misconduct of Northwest Airlines. Appellant itself made reference to the questions of where the acts and omissions in

question took place (Appellant's Brief 34-5). Furthermore, in view of Mr. Cunningham's testimony that a British Columbia Court would, as a matter of law, apply the law of the place where the negligent acts took place, this testimony was essential.

2. Prior Adjudication

Appellant makes reference to the case of *Northwest Airlines, Inc., v. Geraldine B. Gorter, as Administratrix of the Estate of John W. Waldrep, Deceased*, 49 Wn.2d 711, 306 P.2d 213 (1957), claiming that it represents a prior adjudication that the accident occurred in British Columbia. In the first place, that case was instituted on a petition by appellant airlines to revoke appellee's Letters of Administration. The court decided in favor of Geraldine B. Gorter, appellee in these proceedings. The same issue would have been presented to the court had the accident occurred anywhere beyond the borders of the State of Washington. Furthermore, there are certain well-recognized rules of law which completely answer appellant's argument. For example, there is the general rule that one relying upon the doctrine of *res judicata* must plead the prior adjudication. If the estoppel is not pleaded the court is not only not bound to notice it, but is not permitted to consider or take notice thereof. 30 Am. Jur. Judgments 984, Sec. 255, citing many cases. Even in the few jurisdictions in which prior pleading is unnecessary, proof at trial of the subsequent action is necessary. In addition, all courts recognize that a judgment rendered on any grounds which do not involve the merits of the main action may not be used for the operation of the doctrine of *res judicata*. Note, *In re Clifford*, 37 Wash. 460, 76

Pac. 1001 (1905), and *Davies v. Metropolitan Life Ins. Co.*, 191 Wash. 459, 71 P.2d 552 (1937).

3. Washington “Borrowing” Statute

Appellant cites a statute R.C.W. 4.16.290 entitled “Foreign statutes of limitation, how applied” (Appellant’s Brief 38) as authority for the proposition that a cause of action arising in another jurisdiction and there barred by lapse of time, cannot be maintained in this state. Obviously, if the foreign statute purportedly pleaded as a defense is found by a court not to apply, as in this case, it will not be “borrowed” in whole or part by the court of the forum. Furthermore, as is apparent from a reading of the statute, it only applies when the cause of action is between non-residents of this state. The plaintiff in this case is a resident of the State of Washington.

CONCLUSION

Appellant raises no question on this appeal as to its own negligence. Nor does it question that such negligence caused the death of Sgt. Waldrep. Thus, we are here concerned with a United States citizen on duty in the Armed Forces of the United States, bound for the United States on a United States plane operated by a United States carrier, who was killed in an emergency landing outside the United States occasioned by negligent acts occurring in the United States and elsewhere. The action is brought in a United States court by a United States citizen on behalf of a United States beneficiary.

To avoid liability for its negligence in such a case the law places a strong and well-recognized burden on the appellant, to-wit: to sustain the burden of pleading and proving an applicable law different from the law of the forum as applied by the forum court. That appellant has failed in its burden was readily recognized by the trial court and is clearly evident on the record.

An abortive attempt was made to plead and prove a British Columbia statute entitled Families' Compensation Act. Even this pleading and proof failed to assert or prove that under British Columbia law the British Columbia Families' Compensation Act was the sole remedy available to the appellee. Rather the evidence was to the contrary. The court found, moreover, and the British Columbia experts on British Columbia law testified, that this statute had no application to the situs of the accident. Yet no proper attempt was made by the appellant to plead or prove any other law or to

so locate the accident as to make another law controlling.

No attempt at nice or specious approaches to well-settled principles of conflict of laws can supply these deficiencies. Rather such approaches emphasize the soundness of the rules themselves and support the correctness of the trial court in their application.

It is submitted that the trial court reached the only conclusion warranted by sound, well recognized, and peculiarly applicable legal principles and that the judgment for the benefit of Sgt. Waldrep's now orphaned daughter should be affirmed.

Respectfully submitted,

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No. 15670

United States Court of Appeals
For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant*,

vs.

GERALDINE B. GORTER, as Administratrix of the Estate
of John M. Waldrep, Deceased, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

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United States Court of Appeals

For the Ninth Circuit

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|---|-------------------|---|-----------|
| NORTHWEST AIRLINES, INC., | <i>Appellant,</i> | } | No. 15670 |
| vs. | | | |
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| Estate of John M. Waldrep, Deceased, | <i>Appellee.</i> | | |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

I. The Accident Happened in British Columbia

As one of the issues in this appeal, appellant, in its opening brief, asserted that the district court's finding that the accident happened seaward of low water mark was totally unsupported by and contrary to the evidence. The question of where the accident happened is the very heart of this appeal. Yet, appellee has been unable to point to a single scrap of evidence in support of the finding, even though she makes extended reference to testimony of Dudley Cox, Paul Sanders, Hufford Maynard, Donald Baker, and Richard Fields. Let us now examine this testimony. Mr. Cox stated that on one occasion he observed that the wreckage was covered by water; that on another he was unable to walk out to the wreckage; and that three or four days after the accident parts of the wreckage began to break off due to weather and tides. Mr. Sanders stated that the airplane was further damaged after the accident by the changing of the tides; that salvage attempts were made; and that divers inspected the wreckage. Messrs. Maynard and Baker stated that a small outboard boat towed the five survivors through the water to safety and that rescue

operations took about fifteen minutes. Mr. Fields stated that at the time he left the airplane, the water was over his head.

The foregoing is the only evidence that appellee has cited to support the finding that the accident happened seaward of low water mark. It is difficult to see how this testimony can in any way support such a finding; it goes no farther than to establish that the airplane crashed in the water, a fact which has never been questioned. In fact, Joseph Kildahl, the maritime navigation expert, testified that at the time of the accident the height of the tide was 10 feet and rising at the rate of 2 feet per hour (R. 1049). Conspicuously absent from the testimony relied on by appellee is any reference to low water mark. The question of where the airplane crashed with respect to low water mark is entirely unanswered. Appellee cannot answer the question because nowhere in the record is the testimony she relies on related in any way to low water mark. On the other hand, such testimony does establish that the airplane was in the tidal waters surrounding Sandspit. Necessarily then the airplane would be out of water at times and in water at other times, depending on the stage of the tide.

Being unable to find any evidence in the record to support the district court's finding, appellee desperately flails away at the evidence which would amply support a contrary finding, to-wit: that the accident happened *landward* of low water mark. This, of course, can in no way justify the unsupported finding that the accident happened seaward of low water mark. Brief reference shall be made to appellee's attempt to avoid the effect of the testimony of Donald Leonard, which, together with the testimony of Joseph Kildahl, conclusively shows that the accident happened landward, not seaward, of low water mark. Mr. Leonard visited the scene the day after the accident in January, 1952, and again the following June. Mr.

Leonard stated that in June the airplane was completely out of the water at low tide. Mr. Kildahl established that the low tide on that occasion did not extend out to low water mark but was landward of it. This established that the airplane crashed *landward* of low water mark and in British Columbia. Appellee seeks to undermine Mr. Leonard's testimony by suggesting, without any support from the record, that during the period between Mr. Leonard's visits, the airplane was carried hither and yon by the tides. While it is true that parts of the airplane gradually became detached and were floated away by the tides, the main, central portion of the airplane, the wing, engines, nacelles, and main landing gear, remained intact (R. 996). Far from being carried about, the airplane was being gradually buried in the sand (R. 996). Appellee also ignores Mr. Leonard's testimony that the wreckage of the airplane lay in exactly the same location in June as in January after the accident (R. 995). Mr. Leonard further stated that during the salvage operations in January, the airplane was moved but slightly, and when abandoned the airplane was no closer to shore than before (R. 995). Appellee pointed to no evidence, nor is there any, contradicting the testimony of Mr. Leonard. The finding that the accident happened seaward of low water mark is unsupported by and contrary to the evidence.

II. Prior Adjudication

Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, is a leading case repeatedly cited in Washington for the proposition that a decision of that court is the law of the case in another action between the same parties and upon the same subject matter. It further holds that where the state of the pleadings is such that the plea of *res judicata* cannot be interposed and there is no opportunity to raise the point on the introduction of

evidence, the court will take judicial notice of the prior case. Accord: *Reagh v. Hamilton*, 194 Wash. 449, 78 P.2d 555.

The rule of pleading and proof is also relaxed where the former adjudication is not relied upon as an estoppel or in bar. When relied upon merely to establish some fact or issue necessary to a party's case, it need not be pleaded although it is conclusive evidence of such fact or issue. *S.P.R.R. v. U.S.*, 168 U.S. 1, 42 L.Ed. 355; Anno. 120 A.L.R. 8, 67,68.

To set the record straight, appellant's answer was filed December 30, 1955. *Northwest Airlines v. Gorter*, 49 Wn.2d 711, 306 P.2d 213, was decided January 18, 1957. The instant case, originally set for trial October 11, 1956, was continued on motion of appellee until March 12, 1957 (R. 41-42), because the state court decision had not yet been handed down. In the state court case it was found and held in plain and unambiguous terms that the accident and death occurred in British Columbia, Canada. Appellee so alleged in her complaint and she maintained this position throughout the trial. Appellant admitted this fact in its answer, and it was its consistent position at all times. The pre-trial order (R. 51), recited that the accident happened in British Columbia, and that order became the final pleading in the case by order of the trial judge. It was an agreed fact at all times during the pendency of the litigation and throughout the trial. A primary purpose of pleadings in the federal court is to give notice of the pleader's position. If appellee's position was that the accident did not happen in British Columbia, it was a closely guarded secret from beginning to end. She can point to absolutely nothing that so much as hints that the accident happened elsewhere. With this state of the pleadings it is obvious that the appellant had neither the opportunity nor the occasion to introduce evidence of the prior adjudication

to establish where the action happened. If the district court, even though the issue was not in dispute, took upon itself to make an independent determination of where the accident happened, it should have taken judicial notice of the state court decision in accordance with *Wilkes v. Davies, supra*.

As to the scope of the *res judicata* doctrine, a judgment affirming the existence of any fact is conclusive upon the parties whenever the existence of that fact is again an issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. This is the general rule, adopted in Washington. *In re Clifford*, 37 Wash. 460, 79 Pac. 1001, quoting Black, *Judgments*, 2nd Ed., Sec. 609; Freeman, *Judgments*, 4th Ed., Sec. 249, 253.

III. Rejection of Proof of Foreign Law

Appellant is very much incensed and believes that it is time to forcefully direct the court's attention to appellee's continued misrepresentation and distortion of the content of its twelfth affirmative defense. This defense was added to its answer "so that the proper wrongful death statute applicable to the facts of this case may be pleaded," (Motion to Amend, R. 42) and reads in part:

"Defendant . . . alleges that *the* applicable statute on which plaintiff's claim could have been based is Chapter 116, British Columbia Revised Statutes, 1948 . . ."

Appellee repeatedly distorts the pleading by asserting: Page 5—"Appellant merely pleaded that the act 'could' apply." Page 35—"Appellant amended its answer denying the applicability of the Washington Wrongful Death Act, alleging that appellee 'could' have brought its action under . . . the Families' Compensation Act." Page 40—" [Appellant asserted] that a foreign statute 'could' be applicable . . ."

Page 41—“Appellant asserted by its own allegation ‘*could* have been based,’ that other laws might govern appellee’s right of action;” Page 43—“Appellant’s only allegation . . . was that the act . . . ‘*could*’ have been applied . . .” Appellee resorted to this same deception in the heat of the trial in objecting to the introduction of evidence relating to the foreign law. The continued twisting and distorting in appellee’s brief can no longer be ignored; it is obvious and deliberate. Appellant submits that considerations of professional integrity, honesty and candor should outweigh the immediate objectives of appellee’s counsel in this litigation.

Appellant proved the pertinent sections of the Families’ Compensation Act, including the one-year statute of limitation, and the district court so acknowledged (R. 1039). The court excluded evidence offered to prove that the act was the only wrongful death act in British Columbia and in Canada seaward of British Columbia. The court erred in rejecting this evidence because appellant’s affirmative defense stated that said Act was “*the* applicable statute on which plaintiff’s claim could have been based.” (Emphasis added) In other words, no other law afforded appellee a remedy.

Apart from appellant’s twelfth affirmative defense, this evidence was admissible under appellant’s general denial (R. 29) of the asserted cause of action under the Washington death statute. Appellant has never contended that if the action arose in Canada outside of British Columbia that a statute of limitation applicable there was a defense to this action. On the contrary, appellant strenuously urged, offered proof, and even moved to reopen the case to show that no law recognized a cause of action for wrongful death at that place.

Appellee at all times proceeded in reliance upon Washington law (R. 44), even though she now concedes that the Washington wrongful death act does not have extraterritorial force and that she does not have a cause of action under it, as such (Br. 24-25). Appellant in its answer denied that the Washington act was applicable under the facts stated in the complaint. Under such denial appellant was entitled to introduce evidence to prove that appellee had not established a claim under which relief could be granted under Washington law, either directly or aided by a presumption. It was proper by way of general defense to prove the inapplicability of the Washington wrongful death act in the case at bar by showing the non-existence of a cause of action or remedy of this sort under the law of the place where the court found the accident and death occurred. Federal Rules of Civil Procedure, Rule 8(c), 28 USCA 253 does not classify or define a defense of this nature as one which must be affirmatively pleaded.

To this end, appellant attempted to prove, through Mr. John I. Bird, the Canadian law expert, that there was no wrongful death statute at such place. Had this proof been admitted there would have been no basis for presuming that a Canadian statute existed and was identical to the Washington statute, and the latter could not have been applied. The exclusion of such testimony on the ground that no foreign law, except the Families' Compensation Act, had been pleaded was reversible error.

IV. Foreign Statute of Limitations, How Applied

Because appellant is a non-resident of Washington, and any cause of action which arose was in favor of deceased's wife and child, non-residents, not Geraldine Gorter, the nominal plaintiff, R.C.W. 4.16.290 is very much applicable.

V. Presumption as to Foreign Law

Appellee, realizing that federal courts cannot take judicial notice of the laws of a foreign country, recognizes that the only possible basis for sustaining the judgment is by presuming, contrary to actuality, that the law of Canada, proof of which she prevented, is the same as the Washington death statute. Because in federal courts there is a well-defined rule prohibiting the application of such a presumption, appellee contends that a federal court cannot apply its own procedural rules and must apply the foreign law presumption of the state in which it sits. Appellee relies on *Erie v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 85 L.Ed. 1477, and fourteen cases cited on pages 10 and 11 of her brief, none of which support her contention.

It is appellant's position that the case at bar is controlled by *Cuba Railroad Co. v. Crosby*, 222 U.S. 473, 56 L.Ed. 274, which lays down the federal foreign law presumption rule. This case has not been superseded or displaced by the *Erie* or *Klaxon* cases, or any case decided on its authority, notwithstanding appellee's unsupported contrary assertion (Br. 7).

The federal judiciary has its own rules as to how foreign law shall be presented for consideration by the court; namely, formal proof, judicial notice of foreign law, and presumption of foreign law. The judicial notice rule is: The law of any state of the United States, whether statutory or decisional, is a matter of which the courts of the United States are bound to take judicial notice. *Lamar v. Micou*, 114 U.S. 118, 29 L.Ed. 94; *Kaye v. May*, 296 Fed. 450; Goodrich, *Conflict of Laws*, Sec. 80, p. 195. Judicial notice will not be taken of the laws of a foreign country. *Liverpool v. Phenix Ins. Co.*, 129 U.S. 398, 32 L.Ed. 788; *Molina v. Sovereign Co.*, 6 F.R.D. 385.

The federal presumption of foreign law rule is: As be-

tween two common law countries, the common law of one may be presumed to be what it has been decided to be in the other, but it cannot be presumed to be like a statute of the other. *Cuba R. Co. v. Crosby*, *supra*. The Ninth Circuit also follows this rule. In *Gordon v. Commissioner*, 75 F.2d 429, the court refused to presume that the law of Canada relating to contracts between husband and wife was the same as the California statute on that subject. In the *Baymead*, 88 F.2d 144, this court again applied this rule and refused to presume that the laws of a foreign country upon which the claimant's right to a lien was governed were the same as the local law. This rule and the *Cuba* case were cited and followed again in *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (1956).

The term "conflict of laws" refers to conflicts between the laws of the state jurisdiction where the federal case is brought and the substantive law of the jurisdiction where the cause of action arose.

The issue before this court is: In a diversity of citizenship case shall state or federal procedural rules be applied by the federal district forum where the case is controlled by the law of a foreign jurisdiction and such law has not been pleaded or proved? Two cases, *Petersen v. Chicago, G.W.R.Co.*, 3 F.R.D. 346 and *B. & O. R. Co. v. Reaux*, 59 F. Supp. 969, clearly, flatly, and unconditionally hold that the federal court shall apply its own procedural rule in this situation and not the state foreign law presumption, even though the federal rule produces a decision different from the decision which would have been reached had the suit been in the state court. Appellee went to some lengths to avoid citing these cases.

The *Petersen* case was transferred to the district court from the Nebraska state court. Plaintiff sustained injuries in Iowa while a passenger on defendant's train. The law of

Iowa was not pleaded or proved. Under Iowa law the railroad was liable only if its negligence was proved. Under a Nebraska statute the plaintiff was not required to prove negligence. Under Nebraska conflict of laws rules the law of Iowa governed. In the absence of pleading and proof, the Nebraska court would not take judicial notice of Iowa law but would presume it to be the same as the Nebraska law on the subject. Upon these facts plaintiff could prevail only if the Nebraska foreign law presumption was applied. Defendant would win if the district court, under the federal rule, took judicial notice of the Iowa law.

Relying on the *Erie* and *Klaxon* cases and *Waggaman v. General Finance Co.*, 116 F.2d 254, plaintiff contended that the district court must follow the rule of the state of the forum on conflict of laws questions. This is precisely the position that appellee has adopted here. The court in the *Petersen* case conceded that to be true, as does appellant in the case at bar. The reasoning of the plaintiff in the *Petersen* case and of appellee in this case are in all respects identical. But the conclusion that the federal court was obliged to hold, contrary to actuality, that the governing substantive law of the foreign jurisdiction was identical with that of the state of the forum does not follow. In the *Petersen* case, the plaintiff's reasoning proceeded by these steps:

“(a) The law of Nebraska on conflict of laws must govern so far as it is involved in this case; (b) By that law since the plaintiff's petition rests upon an alleged tort committed in Iowa, the law of the state of Iowa governs upon the substantive issue of the existence of a cause of action; (c) Iowa is, as to Nebraska, a foreign state; (d) The law of a foreign state, in a Nebraska state court, is a fact which must be pleaded and proved; (e) If not so pleaded and proved it must be taken and held to be identical with the law of the forum; (f) Therefore, in this case, in the absence of such pleading and proof, the

court was obliged to instruct, contrary to actuality, that the governing substantive law of Iowa is identical with that of Nebraska.”

As to this reasoning the court said:

“In these steps the court will readily grant points (a) and (b), and to the extent only of the practice in the local state courts points (c), (d), and (e). But the conclusion does not follow, for it neglects the distinction in origin and nature of the federal and state courts and the rules of judicial notice which must be applied in this court.”

The court rejected the summary ruling in the *Waggaman* case pointing out “. . . the lack of thoroughness and maturity in its discussion of the point here argued.” The court pointed out that the *Erie* and *Klaxon* cases and *Griffin v. McCoach*, 313 U.S. 498, 85 L.Ed. 1481 do not nullify the federal judicial notice rules. The court ruled:

“*Erie R. Co. v. Tompkins*, *supra*, neither overrules nor impinges upon that rule of pleading and evidence rather than of substantive law, which has long been recognized as obligatory upon the federal courts. . . .” * * *

“There is no question respecting whose law governs. The only distinction arises in the technique of pleading and proof, and that distinction issues from a very real difference in the constitution of the two judicial systems.”

The court held that it was bound to observe Nebraska conflict of laws rules and thus to administer the actual Iowa law, but that it was not affected by the Nebraska foreign law presumption and must apply the federal judicial notice rule.

This case is on all fours with the case at bar, even though this court has before it the other facet of the procedure by which federal courts ascertain the effect to be given to foreign law which has not been pleaded or proved—the foreign law presumption. Appellant’s position is consistent with the requirement imposed on the district court by the *Erie*,

Klaxon and *McCoach* cases to apply the Washington conflict of laws rules. The Washington court would have applied the substantive law of the place where the accident happened. *Richardson v. Pac. Pwr. & L. Co.*, 11 Wn.2d 288, 118 P.2d 985; *Jeffery v. Whitworth College*, 128 F.Supp. 219.

B. & O. R. Co. v. Reaux, *supra*, involved a life insurance contract governed by Maryland law, under which an insured's attempt to change the beneficiary during lifetime was ineffective without the insurer's consent. Under Ohio law the insurer's consent was not required. Suit on the policy was brought in the Ohio district court. Ohio recognized that the validity of the contract was governed by Maryland law which was not pleaded or proved. Ohio would not take judicial notice of the Maryland law, but would presume it to be the same as Ohio law.

Here again the situation is parallel to that before this court. If the federal court were to apply the state foreign law presumption, one result would obtain. If it were to apply the federal rule and take judicial notice of Maryland law, a contrary result would follow. In the instant case, assuming the accident happened outside of British Columbia, the application of appellee's version of the Washington foreign law presumption would produce a recovery for appellee by requiring the federal court to presume, contrary to actuality, that the law of Canada seaward of British Columbia was identical to the Washington death statute. But appellant would have prevailed had the district court followed its own foreign law presumption rule, or had evidence been admitted to show there was no wrongful death statute at the place where the court found the accident happened. In the *Reaux* case, too, the plaintiff relied upon the conflict of laws cases to support her contention that the federal court was required to apply

the state foreign law presumption. The court rejected this contention in a well-reasoned opinion in which it properly classified the cases and held that federal judicial notice rules were procedural and applicable. Pertinent portions of the court's opinion are quoted in the Appendix to this brief. Other decisions in accord with the *Petersen* and *Reaux* cases are: *Alcaro v. Jean Jordeau*, 138 F.2d 767 (CCA-3); *Indiana Bank of Indianapolis v. Goss*, 208 F.2d, 617 (CCA-7); *Trust Co. of Chi. v. Penn. R. Co.*, 183 F.2d 640 (CCA-7); *Prudential Ins. Co. v. Carlson*, 126 F.2d 607 (CCA-10); *Zell v. American Seat. Co.*, 138 F.2d 641 (CCA-2); *Gallup v. Caldwell*, 120 F.2d 90 (CCA-3); *George v. Stanfield*, 33 F.Supp. 486 (Ida.); *Wells Fargo v. Titus*, 41 F.Supp. 171 (Tex.); *Colello v. Sundquist*, 137 F.Supp. 649 (N.Y.); *Metropolitan Life Insurance Co. v. Haack*, 50 F.Supp. 55 (La.).

We now turn to the cases cited by appellee (Br. 10, 11). Appellee has obscured the narrow and well-defined legal issue here involved by indiscriminately citing cases not in point, and by citing as authority cases turning on such substantive laws of the state of the forum as burden of proof, *res ipsa loquitur*, the right to recover interest, and interpretation of state statutes. Furthermore, appellee has loosely joined together such terms as burden of proof and presumption without recognition of the difference in effect between a presumption that forms a part of the substantive law of a state and one that relates only to procedure or the technique of pleading and proof. In addition, appellee has cited conflict of laws decisions which are expressly within the limits of the rules laid down in the *Erie* and *Klaxon* cases, as though determinative of the unrelated problem of what foreign law presumption the federal court shall apply—the issue now before the court. None of the 14 cases supports appel-

lee's contention that whenever federal and state rules as to foreign law presumptions differ, the state rule must be applied. Only the following six cases even involve a foreign law presumption, and none of these present the issue of two conflicting foreign law presumptions: *F.A.R. Liq. Corp. v. Brownell*, 130 F.Supp. 691; *Petersen v. Chi. R. Co.*, 138 F.2d 304; *Sylvania Elec. v. Barber*, 228 F.2d 842; *Waggaman v. General Fin. Co.*, *supra*, *Krasnow v. National Airlines*, 228 F.2d 326; *Molina v. Sovereign Co.*, *supra*.

In each of these cases the result would have been the same whether the state or federal foreign law presumption were invoked; which presumption to apply was not in issue. None of these cases discusses or even recognizes the problem of whether the federal procedural rules of judicial notice and foreign law presumption shall apply in a diversity case.

In *Petersen v. Chi. G. R. Co.*, *supra*, the court refused to apply the state foreign law presumption, and instead took judicial notice of the laws of the foreign state under the federal judicial notice rule. Appellee's terse comment (Br. 11) that "Iowa law presumed same as Nebraska" is wrong.

In *Krasnow v. National Airlines*, *supra*, the district court applied New York law. The appellate court recognized that under the New York conflict of laws rule, Florida law controlled; but it refused to reverse on this ground because the issue was raised for the first time in the plaintiff's reply brief. The opinion disclosed that the federal and New York foreign law presumptions were identical.

In *Waggaman v. General Fin. Co.*, *supra*, the court failed to recognize that a conflict of laws issue was not presented. The court applied the state foreign law presumption which was identical to the federal presumption. Even though the

result would have been the same, the decision has been severely criticized and is no longer the law even in that circuit. *Gallup v. Caldwell, supra*; *Alcaro v. Jean Jordeau, supra*.

In *Sylvania Elec. v. Barber, supra*, the court properly applied the Massachusetts conflict of laws rule. Appellee's terse statement (Br. 11) that the "Federal Court presumed Nebraska presumption of knowledge of danger same as Massachusetts" is not true. The court, on the question of whether interest should be allowed as an element of damage, did presume that the common law of Nebraska was the same as the common law of Massachusetts. The opinion does not indicate whether the federal or state foreign law presumption was invoked. The two rules were identical, and the same result would have followed under either.

In *F.A.R. Liq. Corp. v. Brownell, supra*, the court held that an affirmative defense based on German law was untenable because not pleaded or proved. The court could not take judicial notice of the laws of a foreign country nor, under *Cuba v. Crosby, supra*, presume that the laws of Germany were the same as those of the forum. In her hurried attempt to compile an imposing list of authorities, appellee apparently failed to notice that this was not a diversity case. A choice between a state and federal foreign law presumption was not involved.

In *Molina v. Sovereign Co., supra*, it was held that federal courts can not take judicial notice of the law of a foreign country. The court then applied what it considered to be the federal foreign law presumption.

Adam Hat v. Lafco, 134 F.2d 101, has been erroneously cited as holding that a federal court must apply the state foreign law presumption. The court properly applied the

conflict of laws rules of Pennsylvania and then took judicial notice of the Delaware and New Jersey laws. This was consistent with the procedural rules of Pennsylvania and federal courts. Contrary to appellee's statement of the holding (Br. 11), the court applied no presumption. It did not even mention the subject.

Appellee's unsupported assertions (Br. 7, 8, 11, 12, 49) that the burden of proof in this case is on appellant, particularly with respect to proof of the governing foreign law, is the product of a superficial and erroneous concept. Appellee, as plaintiff, had the duty to establish and prove a cause of action. Goodrich, *Conflict of Laws*, page 193, Sec. 80. It has not been suggested at any time that any Washington statute or decision relieved her from this requirement.

Appellee alleged, and it may be assumed that she established, the existence of R.C.W. 4.20.010, the Washington wrongful death statute. The assertion that appellant had the duty to prove the governing foreign law, and to demonstrate that appellee did not have a cause of action maintainable thereunder, in order for it to prevail, is an incorrect statement of appellant's duty, and a position unsupported by any Washington authority. Appellee recognizes the correct rule (Br. 15) where it stated that the Washington decisions follow the rule that the party asserting the application of a foreign law different from that of the forum has the duty of pleading and proving that law. In this case the district court's first inquiry should have been to determine whether or not the Washington court would have looked to the law of Canada outside British Columbia as the law governing the rights of the parties under the cause of action asserted. The Washington conflict of laws rule on this point is that it will apply the law of the place where the negligence culminated

in injury. *Richardson v. Pacific P. & L. Co.*, *supra*; *Jeffery v. Whitworth College*, *supra*.

The rehearsed answer of witness Cunningham to counsel's hypothetical question (R. 1066) to the effect that the British Columbia court would apply "United States" law, is without legal significance. The witness receded from this position under cross-examination, acknowledging that his view was based solely on an English decision not controlling or binding in Canada. Witness Bird testified that the Canadian rule is that the law of the place where negligence culminates in injury governs. *Renvoi* has been repudiated and is not followed in the United States. Goodrich, *Conflict of Laws*, Sec. 7, p. 12. From the evidence that was introduced, the court was able to make findings of fact establishing the place of the accident, the death of Sergeant Waldrep resulting from the negligence of appellant, and the survivorship of the minor child for whose benefit the suit was brought. There was no evidence from which the court could make a finding as to the applicable law in Canada seaward of low water mark. Had the case been in the state court for adjudication, appellee's position is that her failure of proof of the applicable foreign law would have been aided by the procedural device of a presumption that the foreign law was identical to the Washington law. Appellee selected the federal court as the forum. It is prohibited by its rules from taking judicial notice of the laws of foreign countries and from presuming that such laws are the same as local statutes. She has not established a right to relief.

The district court's memorandum decision (R. 72-80) and findings and conclusions (R. 82-91) do not indicate how the district court arrived at the result that the Washington death act "governs the right of action herein sued upon in Count 1 of the *Gorter* case, no other applicable law being pleaded or

proved.” (R. 73). Until final argument, no reference was made by counsel for either party to the existence or applicability in this case of any foreign law presumption. The court declined in proceedings subsequent to trial to clarify its memorandum decision or to state in either the findings or conclusions what presumption, if any, it had applied. Did the district court erroneously apply the Washington foreign law presumption, or did it correctly regard the federal foreign law presumption applicable and then misconstrue it, as occurred in *Molina v. Sovereign, supra*?

The distinction between substantive matters governed by the *Erie* case and procedural matters, with respect to which federal courts must apply their own rules, is carefully drawn.

“Procedural rules are those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules . . . concern the legal effect of those facts after they have been established.” Stumberg, *Conflict of Laws*, page 128, Ch. VI.

Professor Goodrich, *Conflict of Laws*, Second Edition, Sec. 12, p. 24, recognizes that, since the *Erie* case, federal courts must observe the conflict of laws rules of the state in which it sits. A distinction is made by the court between matters that relate to substance, or matters of right, and those which relate to procedure, or matters of remedy (Sec. 77, p. 187). Procedure is governed by the internal law of the forum regardless of where the transaction occurred (Sec. 77, p. 189), whereas substance is determined by the law where the transaction took place (Sec. 80, p. 193). Procedure “relates to the process or machinery by which the facts are made known to the courts.” Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 Yale Law Journal 311, 325.

When a case contains unproved foreign law elements

which cannot be judicially noticed, Prof. Goodrich sets forth the courses open to the court: (1) The party whose action or defense depends on a foreign law and who fails to prove it, loses because he has not made out his case. (2) The court may apply the internal law of the forum to the facts presented on the ground that this is the only law before the court. (3) If neither of the above courses is taken, certain presumptions may be indulged. He then points out that the foreign law presumption is procedural, not substantive, because it relates to the manner in which facts are to be proved rather than to the facts themselves. (Sec. 80, 81, pp. 195-8)

On each of these approaches appellant is entitled to judgment. Under (1) appellee's action depended on the law of Canada; that was not proved, and she therefore failed to make out her case. Under (2) the district court could not apply the Washington death act directly because it has no extraterritorial force or effect (Appellant Br. 40-45). This is conceded (Appellee's Br. 24). Under (3) the district court had the duty to follow the federal foreign law presumption rule, a matter of procedure governed by the forum.

The remaining cases cited by appellee (Br. 10) involve substantive issues where the federal courts yield to the local law of the state in diversity cases. Representative of this type of case are *New York L. Ins. Co. v. Rogers*, 128 F.2d, 784, and *Equitable Assur. Soc. v. MacDonald*, 96 F.2d 437, where the court applied state laws as to burden of proof of affirmative defenses. In *Hagen v. Washington W. P. Co.*, 99 F.2d 614, the state substantive doctrine of *res ipsa loquitur* was applied. In *Bank of America v. Parnell*, 352 U.S. 29, 1 L.Ed.2d 93, *Palmer v. Hoffman*, 318 U.S. 109 87 L.Ed. 645, and *Cities Serv. Co. v. Dunlap*, 308 U.S. 208, 84 L.Ed. 196, the court simply held that state law determines the necessary elements

of a cause of action. Such matters are substantive and require reference to local law. These cases involved respectively the duty to show good faith of the holder of a forged instrument; freedom from contributory negligence; and that the record title holder to real property was not a bona fide purchaser.

The other three cases relied on by appellee, *Klaxon Co. v. Stentor, Sylvania v. Barber, supra*, and *Sampson v. Channell*, 110 F.2d 754, are holdings that the duty of the federal court to apply local substantive law extends to conflict of laws. This was pointed out in *Petersen v. Chi. G. W. R. Co.*, 138 F.2d 304, where the court, in refusing to apply the state foreign law presumption and recognizing it to be simply a procedural rule, stated:

“There cannot possibly, therefore, have been any violation of *Erie Railroad Co. v. Tompkins* and *Klaxon Co. v. Stentor Electric Mfg. Co., supra*, in the present situation, for those decisions go no further in their concrete application, than to require a federal court to follow the same substantive rules in diversity of citizenship cases that a state court would have applied in the particular case . . .”

VI. Cost of Transcript and Record

Appellee's contention (Br. 46-47) that the cost of the record relating to the negligence issues should not be taxed against her is without merit. Appellant has not appealed from the district court's findings on negligence. So far as the issues on appeal are concerned, reference to the court's 12 findings on negligence (R. 84-87) is sufficient for all legitimate purposes of the litigants.

The judgment should be reversed.

Respectfully submitted,

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APPENDIX 1

APPENDIX

The following is a portion of the opinion in *B. & O. R. Co. v. Reaux*, 59 F.Supp. 969, pages 974-975:

“The court is of the opinion that claimant’s position is untenable in that it advances an unwarranted extension of the doctrine of these Supreme Court cases, all of which stem from *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487. The Supreme Court has held merely that, in diversity of citizenship cases, a Federal court must apply the conflict of laws rules of the state in which it sits. The court did that in this case. The conflict of laws questions involved were what law governed the construction of the contract of insurance in question, and where that contract had been made or entered into. Ohio law, as handed down by the Supreme Court of Ohio in *Alropa Corporation v. Kirchwehn*, 138 Ohio St. 30, 33 N.E.2d 655 (cited in court’s Opinion), was to the effect that the construction of a contract is governed by the law of the state where such contract is made or is to be performed. It is not disputed that the contract was made in Maryland. The court, in its opinion, again cited Ohio law, along with other authority, to the effect that the place where the insurance application is made and accepted and the policy delivered is the place where the contract is entered into. The law of Maryland, therefore, was to be applied by this court because that would be the law which the courts of Ohio would apply.

“It does not follow, however, that because Ohio courts would not take judicial notice of the law of Maryland, this court may not do so. The doctrine of judicial notice is not a conflict of laws rule. In discussing this same question the court, in *Petersen v. Chicago, Great Western Ry. Co.*, D.C., 3 F.R.D. 346, at page 348, called it a ‘rule of pleading and

evidence rather than of substantive law, * * *.' A concise and well-reasoned statement on this question is that of Judge Goodrich in *Gallup v. Caldwell*, 3 Cir., 120 F.2d 90 at page 94: 'This rule as to judicial notice is not affected by *Eric R. R. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, L.Ed. 1188, 114 A.L.R. 1487. That case dealt with the question of the application of the substantive law of a given state, not how such substantive law is brought to the attention of a federal court. Indeed it is implicit in the *Tompkins* decision that it did not affect the rule as to judicial notice in the federal courts since the Supreme Court remanded the case to the Circuit Court of Appeals with instructions that the law of Pennsylvania be applied, even though the Pennsylvania law was not pleaded or proved, and the case was tried in the Southern District of New York. We conclude, therefore, that in the instant litigation we take judicial notice of the law of New Jersey in so far as it is applicable to the rights of the parties in this case.'

"See, to the same effect, *Alcaro et al v. Jean Jordeau, Inc.*, 3 Cir., 138 F.2d 767; *Wells Fargo Bank & Union Trust Co. v. Titus*, 41 F.Supp. 171; *Metropolitan Life Ins. Co. v. Haack, et al.*, D.C., 50 F.Supp. 55; *George v. Stanfield et al.*, D.C., 33 F. Supp. 486.

"While it is true that the case of *Waggaman v. General Finance Co.*, *supra*, sustains the position of claimant Welshans, there should be considered, in the words of the court in *Petersen v. Chicago, Great Western Ry. Co.*, *supra*, 3 F.R.D. at page 348, 'the lack of thoroughness and maturity in its discussion of the point here argued.' It should also be noted that the two cases from the Third Circuit, decided after the *Waggaman* case, viz., *Gallup v. Caldwell*, *supra*, and *Alcaro v. Jean Jordeau*, *supra*, are directly opposed to the doctrine of that case so that it can no longer be considered the law of the Circuit."

No. 15670

United States Court of Appeals
For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant*,

vs.

GERALDINE B. GORTER, as Administratrix of the Estate
of John M. Waldrep, Deceased, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

PETITION FOR REHEARING

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HONORABLE JOHN C. BOWEN, *Judge*

PETITION FOR REHEARING

In remanding the instant case and permitting appellant to amend its answer, the court invokes Federal Rule of Civil Procedure 15(b), wherein it is provided that:

“Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the

merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.’’

It is the belief of the appellee that the application of this rule and the resulting conclusion of the court, was based upon a fundamental misunderstanding of the record, and that when the record is correctly considered, that the application of the appellant to amend (coming as it did twenty-eight days after the conclusion of the trial and announcement of the oral decision of the court) was properly denied.

The decision of the lower court should be affirmed, or, in the alternative, this petition should be granted, for the reasons that:

1. This Court’s decision is based upon a misunderstanding of the record. Proper consideration of the record requires a result contrary to the results reached in the court’s opinion.

2. Federal Rule of Civil Procedure 15(b) has no application herein.

3. The trial court correctly exercised its discretion. A contrary finding results in serious prejudice to appellee.

4. The proposed amendment does not present a legally sufficient defense.

5. There was no “excusable neglect” on the part of the appellant, but in fact there was a complete lack of diligence on its part.

1. Misunderstandings of the Record

As has been suggested, appellee respectfully submits that this Court misunderstood the record on two material points. The first misunderstanding is quite apparent from the Court's statement that:

“Gorter's objection that she has not the funds to pay for an investigation of the law of the Dominion is no more a ground for refusing the right to amend than if it had been claimed as a ground for dismissing the answer.” (Court's Opinion, p. 3, March 28, 1958)

No such objection was made in the consideration of this amendment. The reference thereto concerned a previous motion to amend by the appellant, made before trial wherein the appellant, for the first time asked leave to plead a foreign law (Families' Compensation Act of British Columbia) as applicable to the case at bar (R. 45, 46). That motion was made more than three years after the service of the Summons and Complaint and approximately one month prior to trial. Plaintiff objected to its timeliness but the court granted leave to amend and the amended pleading became an acknowledged issue in the trial of the case. Pursuant to that amendment the appellee did expend her funds, did make an investigation of the law of the Dominion of Canada and did proceed to trial on the basis of the amended pleading.

However, the motion with which we are now concerned was first filed with the court after completion of the trial, twenty-eight days after the announcement of the court's oral decision and one day prior to the formal entry of the Findings of Fact and Judgment in the ac-

tion (R. 58, 92). It was denied by the trial court on the day of the entry of the final judgment. Actually there is nothing in the record to show on what basis the trial court, exercising its discretion, denied the motion. Thus, the reference to "Gorter's objection" in the court's opinion is in error.

The second misunderstanding of the record is even more grave. In the court's opinion the statement is made that:

"Evidence of the law of Canada had been objected to at the hearing as being beyond the scope of the pleadings and no showing was made that the omission of the evidence to sustain the motion for the amended pleading would prejudice Gorter."
(Court's Opinion, p. 3, March 28, 1958)

No attempt was made by any witness, by pleading, by trial amendment, by offer of proof, or in any other fashion to introduce the subject matter of the post-trial amendment (Canadian law applicable seaward of low water mark) at the time of trial. This is conceded even in appellant's affidavit in support of the subject amendment, wherein it is stated:

"However the court in its oral decision found that the accident did not occur in British Columbia, and defendant is now for the first time confronted with this assertion. *Prior to this time, defendant had no occasion to plead and prove the law existing outside of British Columbia, and any attempt to do so would have been improper and objectionable.* It was only after the court's finding that the law outside of British Columbia became pertinent and applicable." (R. 59) (Emphasis supplied)

Perhaps this Court's misunderstanding of the record

was based upon appellant's completely erroneous statements made throughout its opening brief and its reply brief, that an attempt was made by appellant to introduce the law of Canada seaward of low water, and that the court denied the introduction of such evidence. A careful reading of the testimony involved, and we urge the court's scrutiny thereof, makes it clear that appellant was only attempting to prove that by Canadian law the province of British Columbia had been given exclusive authority to legislate within its territorial jurisdiction and that no Canadian statute superseded the British Columbia statute applicable within that territorial limit. This is true of the record as a whole and particularly true of the testimony of appellant's witness, Mr. John Bird, quoted in appellant's brief and set forth in the record (R. 1024-1042). It is even conceded by appellant, as shown above, in the very affidavit submitted in support of the motion to amend.

2. Federal Rule of Civil Procedure 15(b) Has No Application Herein

This rule appears to be primarily directed toward the allowance of amendments to conform pleadings to the evidence, when issues not within the pleading are tried by express or implied consent of the parties or when evidence is offered by one party and objected to *at the trial* on the ground that it is not within the issues made by the pleadings. This latter portion of the rule, quoted by the court, assumes that the evidence is offered during trial and the objecting party heard at the trial on the question of prejudice. With a proper understanding of the record in this case, particularly the

fact that no evidence was offered by the appellant concerning the law of Canada applicable seaward of low water mark, it is difficult to understand the formal application of this rule to this case. Likewise, in view of the tardiness of the application to amend there is nothing in the record to show whether or not the trial court found prejudice. Bearing in mind that the amendment was not argued until the date the Findings of Fact and Judgment were entered, this is not surprising, and the record, as made, does not afford this Court the opportunity to determine that there was, in fact, no prejudice.

It is axiomatic that the right to amend is addressed to the sound discretion of the trial court within the purview of the Federal Rules of Civil Procedure and will only be disturbed for gross abuse of discretion. The Federal courts, including this Court, have announced the rule as such.

Heay v. Phillips, 201 F.2d 220 (9th Cir.) :

“Courts are given wide discretion in granting or refusing leave to amend after the first amendment, and only upon *gross abuse* will their rulings be disturbed. *Wittmayer v. U. S.*, 9th Cir. 1941, 118 F.2d 808, 809 . . . ” (Emphasis supplied)

Lorentz v. R.K.O. Radio Pictures, 155 F.2d 84 (9th Cir.) Cert. denied 329 U.S. 727, 91 L.Ed. 629:

“It was not error for the court to deny appellant the opportunity to amend his complaint. He did not request permission to do so in the trial court except as to certain minor details for which permission was granted. There was no suggestion in the complaint of fraud or mistake and no presentation of facts which would be pertinent to a defense based upon waiver or estoppel which he

now asks the opportunity to allege and prove. If appellant had evidence as to any such defenses he should have filed counter-affidavits in the summary judgment proceedings. *Nahtel Corporation v. West Virginia Pulp & Paper Company*, 2nd Cir. 1944, 141 F.2d 1. The allowance of amendments after issue joined is discretionary with the trial court and refusal of leave to amend is ground for reversal only upon abuse of discretion. *U.S. v. Lehigh Valley R. Co.* 1911, 220 U.S. 257, 31 S.Ct. 387, 56 L.Ed. 458; *Maryland Casualty Co. v. Hosiner*, 1st Cir. 1937, 93 F.2d 365; *O'Quinn v. U.S.*, 5th Cir. 1934, 70 F.2d 599."

3. The Trial Court Correctly Exercised Its Discretion. A Contrary Finding Results in Serious Prejudice to Appellee.

It might be well to examine the state of the record before the trial court at the time of its ruling on this motion. The complaint had been filed in this case more than three years prior to the date of the trial. During motion procedure in the early stages of this litigation appellee had advised appellant by memorandum filed with the court that in the absence of appellant's proper pleading of law at the place of impact, that the Washington rule of presumption would apply (R. 21, 22). Approximately one month before trial the parties were ordered by the court to prepare their proposed pre-trial order. At that time appellant first proposed an amendment to plead foreign law, purportedly applicable at the place of impact. Appellee objected to the timeliness of this motion on the grounds that it would result in economic hardship to plaintiff Gorter to obtain a briefing and proper presentation of foreign law

at that stage of litigation. Nevertheless, the trial court, exercising its discretion, allowed the amendment. Thereupon plaintiff prepared her case, expended her funds, went through pre-trial procedure, and tried the case over a period of weeks upon the issues framed pursuant to an amendment made one month before trial.

Inherent in the appellee's theory of the case pursuant to that amendment was the applicability of the *British Columbia statute at the situs of the accident*.

The trial court found, as a result of the evidence so submitted, that the British Columbia death statute did not cover the area where the plane landed and the death occurred, a holding which the Appellate Court now affirms.

It is apparent from the trial record that both parties, particularly appellant, recognized that there was an issue as to whether or not the Families' Compensation Act of British Columbia applied at this location. This is perhaps best illustrated by the evidence adduced by the appellant itself on its case in chief wherein it attempted to prove the location to be landward of low water mark, called witnesses to so testify and even went so far as to call a tide expert on this point. Appellant understood the issues involved in this proceeding.

Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (Cir. Crt., D.C.):

“If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of

notice then must be, but the actuality, not the technicality, must govern.”

The amendment now proposed is not offered in support of proffered evidence, nor upon an offer of proof. It is purely and simply an attempt to now try the case on a different state of facts, of which the appellant was aware prior to the trial.

A strikingly similar case to the instant case is *Banking and Trading Corp. v. R.F.C.*, 15 F.R.D. 360 (U.S. D.C. N.Y. 1954). In the cited case, defendant moved to amend its answer to include the defense that plaintiff lacked capacity to sue. Defendant admitted that if the motion were granted, plaintiff might be barred by a statute of limitations. As in the present case, the defendant had delayed three years before attempting to raise the defense. Recognizing the inherent prejudice to the plaintiff in the cited case, the court said:

“It is true that amendments to pleadings are liberally granted in the Federal courts. Nevertheless, permission to amend, when the parties may no longer do so, by right, as in the case here, lies within the court’s discretion and is to be freely granted in those instances where justice so requires. No reason has been shown by defendant to justify permitting its proposed defense at this late date. Indeed there are convincing reasons why the defense should be barred. The action was begun almost three years before the present motion was made. The defendant served both an answer and an amended answer without raising the issue of plaintiff’s capacity to sue. . . . Furthermore, defendant has openly admitted that if its present motion is granted it will raise the defense of the statute of limitations as a bar to any attempt

by plaintiff to amend its complaint. . . . Thus, *to grant the amendment would be to reward the defendant for its own neglect in failing to assert sooner, an alleged defense. . . . I am saying that in the interests of justice and expedition, the defendant's neglect should not form the basis for a decided advantage to it and if not certainly at least the possibility of getting plaintiff out of court.*" (Emphasis supplied) 15 F.R.D. at 361, 362.

The instant case is, in fact, an *a fortiori* situation since this proposed amendment came even after the conclusion of the trial and the announcement of the court's oral decision.

4. The Proposed Amendment Does Not Present a Legally Sufficient Defense

In addition to the requirement that the admission of evidence and proposed amendment must not prejudice the opposing party, a further requirement of Rule 15(b) is that the presentation of the merits will be subserved unless the amendment is allowed.

If it were admitted *arguendo* that a cause of action for wrongful death is foreign to the common law and is a creature of statute, and if it were further admitted *arguendo* that there was no such statute at the place of impact, the affidavit submitted in support of the motion to amend is still incomplete. Obviously such application of fundamentals assumes that the cause of action was created in the territory so affected, but the law of Canada as shown by the evidence and testimony of Mr. Cunningham, Chairman of the Maritime Law Subsection of the Canadian Bar Association for British Co-

lumbia, and a member of the Air Law Subsection for British Columbia for the Canadian Bar Association, is that where the wrongful acts occurred outside of that jurisdiction the law of the place where the negligence occurred governs.

“The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States.” (R. 1066)

In the instant case the wrongful acts occurred outside of the jurisdiction of the place of impact and primarily within the State of Washington, where patently a statute exists permitting the plaintiff's suit. *The testimony of Mr. Cunningham is not disputed in the affidavit.* Thus, the affidavit is obviously incomplete on its face and cannot be deemed to state an adequate defense.

5. There Was No “Excusable Neglect” on the Part of the Appellant, But in Fact There Was Complete Lack of Diligence on Its Part

While this Court's decision that the post-trial amendment should have been allowed is based upon the misunderstanding that appellant offered evidence pertaining to Canadian law applicable seaward of low water,

the affidavit in support of the amendment affirmatively denies that any evidence of the Canadian law applicable seaward of low water was offered. Instead the affidavit relies solely on "surprise" (R. 59). The court's opinion appears to accept this explanation by alluding to appellant's failure to meet the proper issues of the case as "excusable error." It is difficult to take this claim of surprise seriously. Often litigants are surprised that a court finds against them on a question of fact, but when the fact sought is inherent in the assertion of the defense itself, the finding can hardly be classified as "surprise." As has already been seen, the complaint had been on file for approximately three years. Defendant, for the first time, sought to plead the applicability of foreign law one month before the trial and set forth the alleged applicability of the Families' Compensation Act of British Columbia as a defense. Obviously, in order to avail itself of this defense it was incumbent on the defendant to show that the Families' Compensation Act of British Columbia was *the law of the place where the accident occurred* and that it was the sole and exclusive remedy at that governing point. This was a fact necessary to its defense and recognized as such during the trial. It is repetitious to refer again to the testimony of the defendant's own witnesses on this very point and its serious attempts to relate their testimony to a location landward of low water mark. Recognizing that a favorable finding on this particular point was essential to its defense, how can its own failure of proof, at this point, be classified as "excusable error"?

Having failed to so prove the defendant now, belatedly, attempts to state that it really didn't make any difference where the accident occurred, that regardless of location, the plaintiff's action is barred. The defendant investigated the accident, knew where it happened, was on the scene immediately thereafter, was represented by able counsel and certainly must have anticipated many weeks before, the defense which it now seeks to assert. It would seem that the most ordinary kind of diligence would require the assertion of the now purported defense, prior to a costly trial. If the defense in fact existed, it was there to see, and the simplest form of pleading or offer of proof would have brought it to the court's attention. Again referring to *Kuhn v. Civil Aeronautics Board (supra)*, the language of the court is particularly pertinent:

“If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice then must be, but the actuality, not the technicality, must govern.”

It is, of course, the position of the appellee that even had it been so presented, it was not an adequate defense. This has been referred to *supra*, but the failure of the zealous attempt to prove one set of facts, and to now assert a possible defense which the most casual consideration would have disclosed, is hardly, in the opinion of the appellee, “excusable error.”

Appellee submits that the probable answer to this gross lack of diligence is that appellant recognized at

all times the inadequacy of the defense it now sets forth in its proposed amendment and elected to try its case on what appeared to it as being a stronger position. But even if there is some other explanation for appellant's neglect, the fact remains that to grant the amendment at this time, would be to reward the appellant for its own neglect in failing to assert sooner an alleged defense. That appellee Gorter would be correspondingly prejudiced goes without saying. The lower court's discretion in this matter should be affirmed by this Court.

Respectfully submitted,

WILLIAMS, KINNEN & SHARP
JOHN W. RILEY
RONALD A. MURPHY

Attorneys for Appellee.

Counsel for Appellee certify that in their judgment this Petition for Rehearing is well founded and is not interposed for delay.

WILLIAMS, KINNEN & SHARP
JOHN W. RILEY
RONALD A. MURPHY

Attorneys for Appellee.

No. 15673 ✓

United States
Court of Appeals
for the Ninth Circuit

ROBERT LEE KORTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

FILED

DEC - 9 1957

PAUL P. GRIFFIN, CLERK

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

No. 15673

**United States
Court of Appeals
for the Ninth Circuit**

ROBERT LEE KORTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States Attorney;

RICHARD H. FOSTER,
DONALD CONSTINE,
Assistants United States Attorney,
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San Francisco 1, California,
MARket 1-2500,
For Appellee.

In the United States District Court, for the Northern District of California, Southern Division

Criminal No. 35569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT LEE KORTE,

Defendant.

INDICTMENT

Violation: Section 12(a), Universal Military Training and Service Act (50 U.S.C., App. 462(a))

The Grand Jury charges that: Robert Lee Korte, defendant herein, being a male citizen, of the age of 24 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948," as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 40 of the Selective Service System in the City of San Francisco, County of San Francisco, State of California, which said Local Board No. 40 was duly created, appointed and acting for the area

of which the said defendant is a registrant, did, on or about the 26th day of November, 1956, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 40, to report to his said Local Board No. 40 to be given instructions to proceed to a place of employment designated by said Local Board No. 40 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto.

A True Bill.

/s/ W. I. KOHNKE,
Foreman.

/s/ LLOYD H. BURKE,
United States Attorney.

Approved as to form:

/s/ J. H. RIORDAN, JR.

Bail, \$500.00.

/s/ O. D. HAMLIN.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above-entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, May 29, 1957.

/s/ ROBERT LEE KORTE,
Defendant.

/s/ RICHARD J. WERTHEIMER,
Attorney for Defendant.

/s/ DONALD B. CONSTINE,
Assistant United States
Attorney.

Approved:

/s/ EDWARD P. MURPHY,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed May 29, 1957.

United States District Court, for the Northern
District of California, Southern Division

No. 35569

UNITED STATES OF AMERICA,

vs.

ROBERT LEE KORTE.

JUDGMENT AND COMMITMENT

On this 17th day of June, 1957, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a Finding of Guilty after trial by Court, Jury having been waived in writing of the offense of Violation of Title 50 U.S.C., § 12(a) App. 462(a), Universal Military Training and Service Act, in that on November 26, 1956, deft. knowingly failed to perform work contributing to the maintenance of the national health, safety & interest as charged in the One (1) Count Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of Nine (9) Months.

It Is Adjudged that Defendant be granted bail on appeal, bail set in the amount of \$500.00.

Examined by:

/s/ DONALD B. CONSTINE,
Asst. U. S. Atty.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Entered June 20, 1957.

[Endorsed]: Filed June 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Michael J. Roche, Judge of the
United States District Court of Appeals and
To Donald Constine, Attorney for plaintiff.

Take Notice that the defendant in the above-entitled action hereby appeals to the United States Court of Appeals, Ninth Circuit, from the judgment herein made and entered in the said United

States District Court on the 17th day of June, 1957,
in favor of said plaintiff and against said defendant
and from the whole of said judgment.

Dated: June 17, 1957.

/s/ RICHARD J. WERTHEIMER,
Attorney for Plaintiff.

[Endorsed]: Filed June 21, 1957.

In the District Court of the United States, for the
Northern District of California, Southern Di-
vision

No. 35,569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT LEE KORTE,

Defendant.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

LLOYD H. BURKE,

United States Attorney, By

DONALD B. CONSTINE, ESQ.,

Assistant United States Attorney.

For the Defendant:

RICHARD J. WERTHEIMER, ESQ.

Monday, June 3, 1957—10:00 o'Clock A.M.

OPENING STATEMENT ON BEHALF
OF THE PLAINTIFF

Mr. Constine: If it please the Court, the file in this case indicates that an indictment was returned against this defendant on March 27, 1957. The defendant plead not guilty and waived a jury trial. So we have before your Honor for Court trial this morning this case.

The indictment charges, your Honor, that this defendant is 24 years of age and is a registrant of Local Board 40. That is in San Francisco.

The indictment charges that he was classified 1-O, which is a conscientious objector classification.

The indictment charges that he refused to report to his local board to be given instructions to proceed to a place of employment to perform work which would contribute to the national health, safety and interest, in lieu of induction. In other words, your Honor, this indictment charges that this defendant was classified as a conscientious objector and refused to perform civilian work in lieu of induction.

The government will show, your Honor, that this defendant, back in 1952 and 1953, was classified 1-A and was ordered to report for induction. We will prove that this defendant refused to report for induction and was indicted for that refusal to report for induction as a 1-A classified [3*] registrant. We will show that he was convicted in this

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

the document I have numbered as No. 2 with a slip of paper in the file. That is the special form for conscientious objection received by the local board on April 21, 1952.

On the first page of that document, in the middle of the page, where it says "Claim for Exemption," the defendant indicates he is opposed to both combatant and non-combatant service in the armed forces.

I wish to call your Honor's attention to page 3 of that same questionnaire. The defendant indicates in Item 1 that he was a member of the Reserve Officers Training Corps, University of California, and he states, however, he was a member because it was compulsory to be so. He also states that he is a member of Jehovah's Witnesses, and on the bottom of that page he states he has been a member of the Lutheran Church in San Francisco.

I wish to call your Honor's attention to a document that I have marked as No. 3 with a slip of paper.

The Court: May 5, 1952?

Mr. Constine: Yes. I wish to read this into the record. [6] The personal interview sheet of the hearing of this defendant indicates that registrant submitted Form 150, Conscientious Objector (reading):

"Registrant reported he has been ordained as a minister since last Sunday 5-4-52. Has belonged to Jehovah's Witnesses since about a year ago. Before that he belonged to the Lutheran Church. Is now employed full time as clerk at the Western

Pacific Railroad. Preaches on Sundays only. Is not now living with parents; has vacant room at girl friend's house, 1821-25th Street. Registrant advised to appeal."

This document is dated May 5, 1952, and it is the interview sheet.

I might state subsequent to this interview he was retained in Class 1-A on May 5, 1952.

Document No. 4, which I have marked as No. 4 in your Honor's file, is merely the certificate of acceptability dated January 19, 1953, indicating he is fully acceptable for service in the armed forces as being physically fit. That is called the certificate of acceptability. I have marked that as No. 4. That document indicates he is physically fit for service in the armed forces.

Document No. 5, your Honor, dated March 3, 1953, is the Department of Justice letter to the Appeal Board in San [7] Francisco, and I wish to read from the bottom of page 2 of that letter—not the first page, but the bottom of page 2 of that letter, which is the conclusion (reading):

"The Hearing Officer concluded that registrant was a bona fide conscientious objector in spite of his comparatively recent conversion. He recommended a 1-I-O classification."

I read on on page 3 (reading):

"Although there is no reason to question registrant's sincere adherence to the precepts of his church, he has failed to establish his claim as a true conscientious objector. By the statement in his SSS

Form 150, wherein registrant admits that he will engage in war if commanded by God, he has removed himself from the purview of the Universal Military Training and Service Act, which requires that a registrant must be opposed to participation in war in any form in order to merit exemption. Registrant's willingness to indulge in theocratic warfare if so ordered by Jehovah necessitates a denial of his claim."

Then the letter concludes (reading):

"After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and [8] non-combatant service are not sustained."

Document No. 6, if your Honor please, is merely the record of appeal, which indicates that he appealed on May 19, 1952. On March 19, 1953, he was classified by his appeal board 1-A, and he was so notified by his local board on March 23, 1953.

Document No. 7, your Honor, is the order to report for induction dated April 13, 1953, in which he is ordered to report on April 28, 1953, at the armed forces induction station in San Francisco.

Document No. 8, if your Honor please, is a letter to the local board from the United States Attorney's office dated June 1, 1953, which indicates that the defendant was indicted on May 13, 1953, for refusal to submit to induction.

Document No. 9, if your Honor please, dated July 3, 1953, is a letter to the local board, again, from the United States Attorney's office, indicating

that the defendant was convicted on July 2, 1953, for refusal to submit to induction.

Document No. 10, if your Honor please——

The Court: Dated July 14, 1953?

Mr. Constine: Yes. That is, again, a letter from the office of the United States Attorney to the local board, indicating that United States District Judge Monroe F. Friedman—that is, the former United States District Judge Monroe Friedman, sentenced the defendant to a term of 18 months in prison, and that was on July 13, 1953. [9]

I might state that thereafter this defendant, your Honor, on September 10, 1953, was classified 4-F, inasmuch as he was in prison in the United States Penitentiary.

The Court: Where does that appear?

Mr. Constine: Your Honor, it does not appear in the file at that point, but by reference back you would find after this letter the defendant was placed in Class 4-F.

Document No. 11, dated December 6, 1954, is a letter to the local board from the office of the U. S. Attorney dated December 6, 1954, advising them that the registrant was released from the United States Penitentiary on March 24, 1954, and was presently on parole. The letter states the parole of this defendant would not expire until February 2, 1955.

I might state, your Honor, that after this letter the registrant was on parole and was then classified in February of 1955. It does not appear chronologically, but I will state, and I am sure counsel will

agree, in February, 1955, he was classified 1-A, and this, I might say, your Honor, is the commencement of the second proceeding for this defendant.

Document No. 12 is really the commencement of the defendant's file which is the basis of this prosecution.

The Court: Dated February 11, 1955.

Mr. Constine: That is correct, your Honor. That is when it was received by the local board. It is dated February 9th and was received February 11th. It is the defendant's letter [10] to the local board. It states as follows (reading):

"Gentlemen:

"This letter is in reply to your card of February 4, 1955. It seems I have once again been classified 1-A by your board."

And then he goes on to say (reading):

"I believe my sincerity as a conscientious objector was thoroughly demonstrated by my previous course of action; and the records of the Watchtower Bible and Tract Society of Brooklyn contain my activities in this duly recognized religious organization."

He states as follows (reading):

"Since, therefore, I am a conscientious objector and a duly ordained minister of religion, I hereby request the withdrawal of Classification 1-A to be substituted by my proper classification, namely, 4-D."——

which is the ministerial classification.

I might state, in effect, your Honor, this is his letter of appeal from his classification of 1-A.

Document numbered 13 in your Honor's file——
The Court: 11 February, 1955.

Mr. Constine: Yes, sir—is the Special Conscientious Objector Form received by the local board on February 18, 1955. [11] It was sent on February 11, 1955. And I only call this to your Honor's attention at the bottom of page 2 of that same document there is listed this defendant's employments from 1952 to 1955, indicating that the defendant has held a number of jobs: Office clerk, mechanic, salesman, mechanic-salesman, salesman, mechanic. And it lists a number of his employers: Southern Pacific, Western Pacific, Cardinal Chemical Company, City of Paris, ABC Weatherstrip Company, Kirby Company of Central California, Davies Automobile Company, which apparently was his employer at the time this document was prepared.

Your Honor, Document No. 14 is the next document I wish to call to your Honor's attention, and that is a letter to the local board from the registrant dated March 7, 1955. I wish to read the first paragraph of that letter, which states as follows (reading):

“I certainly do regret that this reply is tardy, and sincerely hope it will not put you to any extra trouble. I have been so busy compiling all my data that the time passed by before I realized it. This letter is in reply to your form concerning my ecclesiastical duties. Enclosed also please find (1) notarized affidavit from Watchtower Bible and

Tract Society, Inc.; (2) public lecture handbills; (3) letters from other ministers, and (4) copies of my ministerial [12] activities.”

The letter goes on to state what he does as a minister. However, I wish to call to your Honor’s attention page 9 of this letter, this same letter, which is numbered page 9. It is a rather long letter, but I ask you to turn to page 9, your Honor.

The Court: Proceed.

Mr. Constine: An item which he has numbered IV, he states as follows (reading):

“Since we do not receive a salary, or are otherwise reimbursed for our ministerial duties, it is necessary (and scriptural) to work secularly to earn a living. Being married, I have an obligation before God to provide for my household, and this is done through secular work. It is important to note, however, the main reason for secular work is to support my ministerial activities. I am now employed at Davies Auto Company in Redwood City, working out in the garage. I previously had a selling job, but gave it up as it took up too much of my time. I do not desire to make a lot of money, but to work the minimum number of hours, that is, 40 hours a week. From this particular job I would earn in a year about \$3,400 gross. My plans for the future are, of course, to enter the pioneer or [13] full-time minister with my wife.”

Your Honor, he says he plans in the future to enter the pioneer or full-time ministry with his wife.

He concludes by saying he has some additional

documents to be forwarded to the board at a later date.

Document 15, your Honor, was enclosed in this letter that he sent. It is numbered 15 by the slip of paper, and it is a document dated February 16, 1955, issued by the Watchtower Bible and Tract Society, indicating that this registrant was an assistant presiding minister of the Menlo Park, California, congregation of Jehovah's Witnesses since December 7, 1954.

Document 16, your Honor, is an interview sheet, or information sheet dated on the last page April 13, 1955. It is numbered in your Honor's file No. 16. It has the registrant's name on the top with his selective service number, and I wish to read into the record portions of this sheet (reading):

“When did you first become a member thereof? Date baptized 4-17-52.

“Have you maintained your membership continuously therein since you first became a member? Yes. Have been active in society work since that date. A membership roll is not kept by this society.”

Item B (reading):

“What course of study were you required to [14] complete before you were qualified to become a minister? Course of study outlined by society. No set time to prescribe the course. Depends upon individual. Scripturally minister is not required to attend theological seminary or divinity school. Christ himself did not. Individual knows when he is ready to serve the Lord and no one has to tell him.”

And then he goes on to state he is still studying in that course. (Reading:)

“If a regular minister, are you recognized as such by the Church?”

The answer is “Yes.” (Reading:)

“Are you legally qualified to perform marriage ceremonies?”

And the answer is “Yes.” (Reading:)

“If you are, how many marriages did you solemnize in the last calendar year?”

The answer is “None.” (Reading:)

“Are you authorized by your church or religious organization to conduct funeral services?”

He answers “Yes.” (Reading:)

“If you are, how many such funeral services did you conduct in the last calendar year?”

He answers “None.” And so on. [15]

He states on page 2 of that same document, your Honor, that he holds services on Saturdays and Sundays, and on Monday, Tuesday, Wednesday and Friday evenings. He states he spends about 25 hours a week during the past 12 months in his ministerial duties. He says he receives no pay.

He also states that he is employed by the Cardinal Chemical Company, and that he worked 20 hours in last week (reading):

“Have you been employed during the present calendar year?”

He states he has, and he names the Davies Auto Company as his employer, and that he worked 40 hours per week.

I might state, your Honor, that after this information sheet was given to the defendant he was placed in Class 1-A by his board on April 13, 1955, so Document 17 in your Honor's file is the letter of the defendant dated April 18, 1955, in which he states (reading):

“At this time your classification of 1-A was continued despite the facts in my file attesting to my sincerity as a conscientious objector and my activities as a regular and duly ordained minister of religion.”

That is Document No. 17 in your Honor's file.

Document No. 17-A, as I have marked in your Honor's file, is merely a certificate of acceptability indicating that this defendant was re-examined, and that he was still found, on [16] December 14, 1955, as fully acceptable for induction into the armed forces.

Document No. 18, your Honor, I wish to spend some time with, inasmuch as this is perhaps the most important document in the file. It is a letter dated February 29, 1956. This is the letter of the Department of Justice, the ultimate one, to the Appeal Board. This is the second hearing of the registrant before the Appeal Board. Inasmuch as counsel's file may not be in the same order mine is, may I assist him in locating the document, your Honor? I call this document No. 18.

This is, your Honor, the results of the hearing on the second occasion for the new classification subsequent to his imprisonment. It states, in the first paragraph—I will read all of page 1 (reading):

“As required by Section 6 (j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. Frank O. Merritt, a Hearing Officer for the Department of Justice.

“The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the resume of [17] the inquiry attached hereto and made a part hereof.

“The registrant will be 23 years of age on March 22, 1956; he is married, a high school graduate, and attended college for about one and one-half years. At the time of his hearing he was engaged in the servicing of swimming pools, and has previously worked as a general laborer, and with automobiles. He is a Jehovah's Witness, and has claimed exemption from both combatant and non-combatant military training and service.

“Registrant's Selective Service File reflects that his father is a protestant, his mother a Presbyterian, and that he, the registrant, was formerly a member of the Lutheran Church. He participated in R.O.T.C. training while in attendance at college, but

he indicated that this was prior to his becoming a conscientious objector.”

Then it goes on, your Honor, to state the history. Well, I will read all of page 2 at this point (reading):

“He indicated that he left college and the R.O.T.C. organization because of his newly-adopted views. It is also indicated that he came in contact with Jehovah’s Witnesses in about 1950 or 1951, through his former fiancée, and that he was baptized in the spring of 1952. He indicated that he has [18] dedicated his life to serving Jehovah God and His Son Christ Jesus.”

The second paragraph reads as follows (reading):

“The resume of the inquiry reflects that registrant was found guilty of a violation of the Selective Service Act in July of 1953; that he was sentenced to 18 months imprisonment; that he was released from prison in March of 1954, and released from parole in February of 1955.”

The third paragraph reads as follows (reading):

“The registrant personally appeared before the Hearing Officer on August 23, 1955, at San Francisco, California. He submitted to the Hearing Officer”—certain documents, this letter states, and (reading):

“The Hearing Officer reported that registrant admitted receiving a copy of the resume of the inquiry, and that his objections thereto are outlined

in the letter addressed to the Hearing Officer"—et cetera.

I might state this, your Honor: Unlike cases we have had in the past, the registrant now receives a copy of the FBI report prior to his hearing, so that any adverse material in it he may bring to the attention of the Hearing Officer and contest. This letter merely states he acknowledges receiving a copy of this document. [19]

The Court: I have an appointment. We will have to take a recess until two o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [19-A]

Monday, June 3, 1957—2:00 o'Clock P.M.

Opening Statement on Behalf of the Plaintiff
(Resumed)

Mr. Constine: Your Honor, at the close of the session this morning we were presenting the case of United States against Korte, and advised your Honor that this defendant had first been classified 1-A, had been ordered to report for induction, and had refused, and had been indicted and sentenced to a term of 18 months.

We were then in the course of presenting the second phase of the case.

The second time around is on Document No. 18 in your Honor's file, which was the report of the second hearing he had had before the Department of Justice.

The Court: Very well.

Mr. Constine: I was reading, your Honor.

The Court: This is February 29, 1956?

Mr. Constine: Yes, sir.

And I was reading from page 2 of that document which I wish to complete this record (reading):

“The registrant personally appeared before the Hearing Officer on August 23, 1955, at San Francisco, California. He submitted to the Hearing Officer three letters which are attached. The Hearing Officer reported that registrant admitted receiving [20] a copy of the Resume of the Inquiry,”——

and I might explain that that was the report of the Federal Bureau investigation, and a resume of that report is now given to all registrants (reading):

“The Hearing Officer also reported that registrant stated that his religious background is that of a Presbyterian, to which both of his parents belong, and that early in life he attended Sunday School of that denomination; that he became interested in the work of the Jehovah’s Witnesses in 1951, and that his wife had been a Jehovah’s Witness since 1941. He reported that registrant further stated that from reading and studying the Bible, and as he understood it, he is opposed to all wars except God’s wars; that he would defend himself and his family if attacked; that he would not take a human life; that he believed in obeying all laws of the Government and wanted to be a law-abiding citizen, but

that he is opposed to both combatant and non-combatant military service.

“The Hearing Officer concluded, from the facts adduced at the hearing, consideration of the registrant’s entire file, his attitude, candor, and apparent honesty, and his general [21] demeanor, that the registrant is opposed to war in any form based upon his religious training and belief; that he is opposed to both combatant and non-combatant training and service; and, that he is sincere and has filed his claim in good faith. Accordingly, the Hearing Officer recommended that the registrant’s claim be sustained.”

And I might say the Department of Justice finds that the registrant’s claim is sustained and the Department recommended that this registrant be placed in Class 1-O, which is the conscientious objector classification.

Your Honor, attached to that letter is the Resume of the Inquiry, which follows right after the last page of the letter.

The Court: Page 58.

Mr. Constine: That is right, your Honor. And I wish to read from the last paragraph on page 1 on that 58 (reading):

“The registrant has been employed by the Western Pacific Railroad, Cardinal Chemical Company, the City of Paris Department Store, ABC Weatherstripping Company, Kirby and Company of Central California, and the Davies Chevrolet Company. The registrant’s work record is highly satisfactory.”

I wish also to read, your Honor, from page 4 of that same resume, which would be, at the upper right-hand corner, 61.

The Court: I have it. [22]

Mr. Constine: The first paragraph, your Honor, is as follows (reading):

“A member of the Jehovah’s Witnesses at Menlo Park, California, advised that the registrant is very active and serious in the Witness work, and is Assistant Congregational Servant at the Menlo Park Kingdom Hall. The interviewee said that the registrant has an excellent record as a Pioneer and never misses a Witness meeting, and is also active as an Area Study Conductor. He stated that the registrant accepts any church assignment willingly, and, in his opinion, must have had a very strong attitude and conviction of conscientious objection to have originally made such a claim and served in a penitentiary.”

I call your Honor’s attention particularly to the next sentence (reading):

“The Congregational Servant of the Jehovah’s Witnesses at Menlo Park advised that he has known the registrant for six or seven months. His records show that the registrant served as a Pioneer from December, 1952, through August, 1954. The Servant stated that the registrant presently spends from thirty-eight to forty hours per month in Jehovah’s Witnesses’ work.” [23]

The next paragraph reads (reading):

“The School Servant and Record Clerk of the Watchtower Bible and Tract Society, Brooklyn, New York, advised that the registrant was ordained as a minister in the Jehovah’s Witnesses on April 17, 1952, and served as a Pioneer from December 1, 1952, until August 1, 1953, and from April 1, 1954, to August 1, 1954.”

It goes on to say (reading) :

“The Servant made the registrant’s record available, which reflects that the registrant devoted considerably more than 100 hours per month to his activities.”

I will next call your Honor’s attention to Document No. 19.

The Court: Dated March 9, 1956.

Mr. Constine: I have April 4, 1956, Document No. 19, unless I am in error.

The Court: Document No. 19 is April 4, 1956.

Mr. Constine: Yes, sir. That is a letter to the Selective Service System from the defendant, in which he says (reading) :

“This is in reply to your letter of March 9, 1956 (which included a recommendation from the Department of Justice and the FBI Resume Report).”

He goes on to state he appreciates the time and effort expended (reading) : [24]

“However, as my entire file reflects, the classification to which I am entitled is 4-D, a minister’s classification.”

Then he goes on and states his reasons for desiring the 4-D classification.

“I am both a conscientious objector and a minister, and I do not see why this has been consistently overlooked in this whole investigation.

“I find, therefore, that I cannot conscientiously accept a 1-O classification, and I hereby appeal this classification if the 1-O classification is continued and if I am ordered to report for a government job I shall have to refuse.”

Your Honor, we note that the defendant, in this letter, does not dispute the statement in the FBI report that at the time of the hearing he was spending but 30 to 40 hours a month as a Jehovah's Witness.

Mr. Constine: I will call your attention, if your Honor please, to Document No. 20, in which it is indicated that the Appeal Board, on July 20, 1956, placed this defendant in Classification 1-O, which is the conscientious objector classification. He was notified of that fact on July 26th. However, he received the classification on July 20, 1956—the 1-O classification.

Document 21, your Honor, is a letter dated August 1, 1956, [25] from the registrant, the defendant, to his local board, in which he states in part (reading):

“I find, therefore, that I cannot conscientiously accept a 1-O classification, and I hereby appeal this classification. If this classification (1-O) is con-

tinued and I am ordered to report for a government job I shall have to refuse.”

And then he states at the bottom of this letter (reading):

“I would appreciate hearing from you as to how long it will be before I am to be arrested, as I would like to notify my employer, my attorney, and straighten out my other personal affairs.”

Document 22, your Honor, is another letter from the defendant to his local board, dated August 5, 1956, and received by his local board—I made a mistake; excuse me.

The Court: August 31, 1956, Local Board No. 40.

Mr. Constine: My file is in error here, your Honor. Document 22, as I believe it is marked in your Honor’s file, should be a letter dated August 29, 1956.

The Court: 22?

Mr. Constine: Yes—which it is, Document No. 22.

The Court: Document 22, August 1, 1956?

Mr. Constine: I believe it is August 29, your Honor, 1956, received August 31st—Document 22.

The Court: Document 22 is August 29th. [26]

Mr. Constine: Yes, sir.

This letter is addressed from the defendant to his local board, in which he states that he did not check any of the preferences—that is, preferences for jobs (reading):

“* * * on the opposite page, because I do not wish to engage in any conscientious objector program.

In many of my previous letters I have stated if I were offered such jobs I could not conscientiously accept them.

“As I have already stated before your board, and as my file shows, I am an ordained minister of a recognized religious organization. Therefore, my proper classification is not 1-O, but is 4-D. I will not compromise my personal principles to the extent which your board proposes. I cannot understand, gentlemen, why it is so difficult for you to understand that I am not only a conscientious objector, but also a minister of religion.”

Document 23 is the next letter I wish to call to your Honor's attention.

The Court: That is dated September 26, 1956.

Mr. Constine: Yes, your Honor. It is addressed to the local board from Selective Service headquarters at Sacramento, and it is the two letters directly following this in the file that I wish your Honor to examine. They are not numbered, but [27] it is directly after this in the file.

The first is a letter to the Jehovah's Witnesses in Brooklyn, New York, from the Selective Service, asking information concerning this defendant's Pioneer work, and the next letter is a copy of a letter received by the California headquarters, which is dated September 19, 1956, and reads in part as follows (reading):

“Mr. Korte was in the pioneer service in 1952, 1953, and 1954. However, because of obligations requiring greater financial remuneration, it was neces-

sary for him to leave the pioneer service. He is now serving as Assistant Congregation Servant of the Menlo Park, California, Congregation of Jehovah's Witnesses and our Certificate for Servant in Congregation of February 15, 1955, covering this man's ministerial activity still applies."

And they refer to the previous certificate on file.

In Document 24, your Honor, is a resume of a hearing before the local board on October 18, 1956. The purpose of this hearing was to determine what type of civilian work the defendant would accept in lieu of induction, and I wish to read to your Honor, if you will permit me, a short resume of some of the questions and answers that were given (reading):

"Question: Mr. Korte, you understand that I am representing the State Director and that this [28] meeting was called to try to reach an agreement between you and the Local Board as to the type of civilian work you are to perform in your present 1-O classification?"

And he answers, "Yes."

Then he answers that he received the regular form for Class 1-O registrants, and he says yes (reading):

"Question: The Local Board submitted a letter to you offering you three different types of work, and this is your reason for nonacceptance written on the back of the Board's letter?

"Answer: Yes."

And that reason, if your Honor please, was one of the documents I last read to you (reading) :

“Question: Is there any reason, such as physical, that you cannot accept approved civilian work?

“Answer: No.

“What is your reason for not accepting? Is it due to your religious code?

“Answer: No; my personal feeling, or, you might say, mental; also Code of the Bible.

“Question: We have numerous positions available (registrant shown list of available positions). Would you care to peruse the list of available work?

“Answer: I would not be interested. My [29] duties revolve around the Bible.

“Question: Are we to understand by your answers that you are in no position to accept employment?

“Answer: Yes.

“Question: What kind of work are you doing at the present time?

“Answer: I am at the present time doing maintenance work at a swimming pool.”

The second page, your Honor (reading) :

“Question: Could you not continue to do this type of work if ordered to do so?

“Answer: Yes, but I could not compromise my position at this time to do so.

“Question: You have been offered all your rights, personal appearance, appeal, appearance before a Hearing Officer; at this meeting your classi-

fication does not enter into it. We are only here to reach an agreement as to the type of work you will accept. From your remarks, are you declining to accept any of the positions offered to you?

“Answer: Yes.”

Then it is indicated that he signed a statement to that effect.

May it please your Honor, Document No. 25 in your Honor's file, is the order to report for civilian work. It is dated [30] November 14, 1956, and it ordered the defendant to report to his local board at 9:00 a.m. on the 26th day of November, 1956, and advises him that he has been assigned to work at the Los Angeles Department of Charities, located at Los Angeles, California. This is an order to report for civilian work in lieu of induction.

Document No. 26 is the last document I wish to call to your Honor's attention. It is a memorandum dated November 26, 1956.

The Court: It is dated what?

Mr. Constine: November 26, 1956. This memorandum, your Honor, indicates that the defendant did not appear at his local board on the date specified to receive instructions to report for civilian work in lieu of induction.

The Court: In other words, he didn't appear in Los Angeles?

Mr. Constine: He didn't appear. He is ordered, your Honor, to appear at his local board. He didn't appear there or at Los Angeles.

In closing, your Honor, we will merely state that

the record clearly indicates he was classified as a conscientious objector. The Appeal Board so held. He was classified 1-O as a conscientious objector, but he has refused to accept civilian work in lieu of induction.

I will merely point out that the civilian work program [31] has been upheld by your Honor in *United States versus Niles* that proceeded to the Supreme Court, and certiorari was denied. That is a landmark case in which your Honor upheld the constitutionality of the Act. And we submit on that case that the defendant is guilty of the offense charged.

Mr. Wertheimer: May it please your Honor, at this time now comes the Defendant Robert Korte and moves for a judgment of acquittal. The undisputed evidence, your Honor, we feel indicates that the defendant is not guilty as charged.

The record you have before you reveals that on July 20, 1956, Mr. Korte was classified 1-O, conscientious objector, by the appeal board. At this time he was denied the 4-F classification required by Selective Service Regulation 1622.2, and more specifically by 1622.44. And I should like to read Paragraph C of that regulation, your Honor (reading):

“Class 4-F. Physically, mentally or morally unfit.

“1622.44 of the Selective Service Regulations.

“In Class 4-F shall be placed any registrant.

“(C) Who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who

is not eligible for classification into a class available for service.”

The classification by the Appeal Board on July 20, 1956, [32] we believe to be without basis in fact, to be arbitrary and capricious, and contrary to law. But actually, the undisputed evidence has shown, as reported by opposing counsel, that Mr. Korte did serve a sentence for a felony, was convicted for a period of longer than one year, and therefore would fulfill the requisites of the Selective Service regulation to be classified as 4-F.

The Act itself, the 1948 Selective Service Act, Paragraph M, reads (reading):

“No person shall be relieved from training under this title by reason of conviction of a criminal offense except where the offense of which he has been convicted may be punished by death or by imprisonment for a term exceeding one year.”

Therefore, the final assignment and order in the case of the Defendant Mr. Korte to do civilian work is void.

The second point, your Honor, in our motion for judgment of acquittal, is that the action of the Appeal Board on July 20, 1956, was arbitrary and capricious and contrary to law in that they did not follow the actual Selective Service regulations as defined in Section 1623.2. I read from the regulations (reading):

“1623.2. Consideration of Classes.

“Every registrant shall be placed in Class 1-A under the provisions of Section 1622.10 of this [33] chapter except for classifications which are estab-

lished to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class 1-A-O considered the highest class, and Class 1-C considered the lowest class, according to the following table:" and there follows the table beginning at Class 1-A-O and going down to 1-C.

In this, the Appeal Board failed to follow this particular regulation by coming up from the bottom, for had they come up from the bottom they would have gone 1-C, 1-WV-A, 4-F, and Mr. Korte would have been classified 4-F. But, instead, to the contrary, they started at the top, 1-AO, and then classified him in the next category, 1-O, conscientious objector. This, we feel, ignored the 4-F classification entirely, and is contrary to 1623.2 of the regulations. Thus, the resulting classification was arbitrary and capricious, and without basis for and contrary to law. Therefore, we feel that it is void.

A third basis for a judgment of acquittal, your Honor, is the fact that, while Mr. Constine failed to indicate it, in one of the documents in the file a waiver was given by the armed forces to Mr. Korte, and it is attached to a document dated September 9, 1955. We believe that——

The Court: Pardon me. Is that document in evidence? [34]

Mr. Wertheimer: It is in evidence, but it was not pointed out by Mr. Constine. There is a waiver on the DD 47 form, I believe, and the waiver states

that Mr. Korte is eligible for the Army, the Navy, or the Marine Corps.

In our motion for acquittal at this time we say that it is not sufficient to make the defendant liable for civilian work, and that the waiver which is found in the documents in the file is not provided for either in the Act or the Regulation; that the civilian direction can be avoided, and that the armed forces may waive a disqualification for a place in civilian employment is without basis of fact and is arbitrary and capricious. It is our feeling that this waiver is good only, as indicated by the document itself, for military service, and therefore the final order which commands the defendant to report to the Los Angeles Charities is void.

On the basis of our motion for acquittal, your Honor, the fourth point we wish to raise is that the Selective Service File failed to contain any waiver of the conviction of the felony from the Los Angeles Charities Department. There is nothing in the file to show that the defendant is acceptable to the Charities, and, notwithstanding his conviction, there is no legal basis for him to be ordered to report to Los Angeles after being convicted of a felony.

Thus, in brief summary, our motion for acquittal is based, first, on the fact that he served time—eight months, to be [35] exact—for a felony; that on the basis of the regulations and the Act this would provide him, according to the regulation I read, for 4-F classification;

Secondly, had the classification schedule been followed, they would have begun at the bottom and go

up to the 4-F, not beginning at 1-AO and going down to the 1-O rating;

Thirdly, considering the waiver, had this been an effective waiver, as it is for the armed forces, certainly he should have gone back into the armed forces; but on July 20, your Honor, he was not a member of the armed forces. Therefore the waiver is ineffective and there is no basis for it;

And lastly, our point is that there is no waiver by the Los Angeles Department of Charities itself, saying that Mr. Korte, the defendant, might proceed there, and therefore the order is void.

It is on these four bases we move for a judgment of acquittal at this time.

(Whereupon followed argument of counsel not ordered transcribed in this record.)

The Court: May I inquire, for the purpose of the record, are you going to put on any other defense?

Mr. Wertheimer: After you rule on the motion we would like to put on a little bit of evidence, your Honor, if it is necessary.

The Court: For the purpose of the record, at this time I [36] will deny your motion, so you will have a full record.

Mr. Wertheimer: Will you take the stand?

ROBERT LEE KORTE, JR.

the defendant, was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

By the Court:

Q. Your full name, please.

A. Robert Lee Korte, Jr.

Q. Where do you live?

A. In Menlo Park, California.

Q. What is the address?

A. 727 Cedar Street.

Q. What is your business or occupation?

A. Well, my vocation is that of a minister, sir.

Q. Well, you have been employed during this period, have you?

A. I now have a secular job with a swimming pool company, part-time work.

Q. Where? A. In Redwood City.

Q. Redwood City? A. Yes.

Q. And how old are you? A. Twenty-four.

Q. Twenty-four years of age. You have already been committed? A. Yes, your Honor. [37]

Q. And when were you committed?

A. That was back in about 1953, I believe.

Q. '53? A. Yes.

Q. Who committed you? This Department here—this Court here?

A. It was the Federal Court, yes, in San Francisco.

Q. What time did you serve?

A. I served eight months of eighteen months.

(Testimony of Robert Lee Korte, Jr.)

Q. And did you have any difficulty adjusting yourself there? A. Well, a little bit at first.

The Court: Take the witness.

Direct Examination

By Mr. Wertheimer:

Q. Since we are on the subject, regarding your term at McNeil Island—well, I will read from the file—you might indicate to the judge what sort of work you did while you were in prison.

A. Well, we started out on the farm crew. We worked picking peaches, pears, and et cetera, from trees, and then when you have worked there for awhile, of course, you are eligible for better jobs, and eventually I was on the dairy crew, which was really quite interesting, how to milk cows, and so forth. And that was the employment that we had there.

The officials at McNeil were very co-operative in the sense that there were a number of my brothers there—Christian [38] brothers—so they permitted us to have our regular meetings during the week in our own barracks. And so that is why most of our recreational time was spent in studying to further our vocational——

The Court: You say you are employed at the present time in Redwood City?

A. Yes, sir.

Q. What is your salary there?

A. I make about—well, I work about ten days a

(Testimony of Robert Lee Korte, Jr.)

month and make about, roughly, \$16.00 a day, so it would be about \$160 a month.

Q. Who is at home with you?

A. My wife.

Q. How long have you been married?

A. About three years.

Q. Any family? A. No, your Honor.

Q. And how long have you been working at Redwood City?

A. Well, since I moved down there; it has been about four years, I guess.

The Court: Proceed, counsel.

Q. (By Mr. Wertheimer): Where did you attend high school?

A. San Francisco, Polytechnic High School.

Q. Did you have any honors while you were in high school?

A. You mean jobs in the school? [39]

Q. I just wanted to indicate your high school record, being one where Robert Korte was student body president at Poly High School.

Mr. Constine: May it please your Honor, for the record, I must interpose an objection, as this would be irrelevant, immaterial and incompetent, so far as the trial is concerned. However, I do not want to prevent the defendant from saying whatever he wishes to say in court. For the purpose of the record may I interpose an objection to any testimony not contained in the file?

The Court: It will be overruled.

(Testimony of Robert Lee Korte, Jr.)

Mr. Constine: Thank you.

Q. (By Mr. Wertheimer): While you were in Poly High School you were president of the student body. What sports activities were you involved in at that time?

A. I played on the basketball team and tried out for the baseball team and didn't make it.

Q. You were a basketball player at Poly. Did you attend college, Mr. Korte? A. Yes, I did.

Q. And where did you go to college?

A. University of California.

Q. And how long were you there?

A. About a year and a half.

Q. In the years 1952, 1953 and 1954, were you actually [40] spending full time as a minister?

A. Yes; one of the requirements of the Watchtower Society is that——

Q. Speak up.

A. One of the requirements of the Watchtower Society is before you can enter the full-time ministry you have to show by your past actions that you are capable of holding that job. And so no one is allowed to enter the full-time ministry until they have been associated for about six months. At the end of that time, why, I did enter the full-time ministry, and I stayed in it until near the end of 1954.

Q. You were classified as a Pioneer at that time?

A. That is correct.

Q. Would you tell his Honor what a Pioneer is?

A. Well, a Pioneer is a title used by the Society to designate one whose vocation is the ministry, and

(Testimony of Robert Lee Korte, Jr.)

who spends in the actual ministry activity preaching, delivering funerals and weddings, visiting the sick, and so forth, a minimum of 100 hours a month. This, of course, then requires outside study which cannot be counted as preaching time. You usually spend another, anywhere from 45 to 50 hours a month in preparing discourses, time going to and from conventions, and things like that.

Q. At the time of the 1-O classification in July, 1956, you were not a Pioneer, is that correct? [41]

A. That is correct.

Q. But were you to be classified now, and was this to be a void classification, regarding your work at present, are you a Pioneer at present?

A. Yes, I am.

Q. And how many hours per month are you putting in in your vocation? A. One hundred.

Q. And does that include hours of study?

A. No, it does not.

Q. Would you tell his Honor approximately how many hours of study and actual work as a minister you put in per month at the present time?

A. I am what they call the assistant presiding minister of our Menlo Park congregation, which means if anything drastic happens to the presiding minister, why, I would take over his obligations. There are many records that have to be kept and oversight of particular duties that have to be done, and plus my outside study I would say between 15 and 25 hours a week are spent in outside study and taking care of congregation business.

(Testimony of Robert Lee Korte, Jr.)

Q. At present you are able to perform marriages and officiate at funerals, is that correct?

A. Correct.

Q. You are the assistant presiding minister and you are a [42] Pioneer at the present time?

A. That is correct.

Mr. Korte, did you keep the Board informed during all of your relations and all of your movements and activities? A. Yes, I did.

Q. And, Mr. Korte, have you ever received a waiver from the Los Angeles Department of Charities?

Mr. Constine: I will object to that as incompetent, immaterial and irrelevant, your Honor, whether he received a waiver from the Department of Charities. There must be a foundation laid that they are required to submit such a waiver.

Mr. Wertheimer: I will be glad to attempt to lay a foundation, your Honor.

The Court: Sustained.

Mr. Wertheimer: Excuse me, your Honor.

The Court: Sustained, counsel.

Q. (By Mr. Wertheimer): Were you ever examined by the Los Angeles Department of Charities?

Mr. Constine: Objected to as immaterial, irrelevant and incompetent. He is assigned to work by the Selective Service.

The Court: Objection sustained.

Mr. Wertheimer: I would like to read a few statements from the file, your Honor.

(Testimony of Robert Lee Korte, Jr.)

Mr. Constine: Are you going to ask him questions?

Mr. Wertheimer: I am. [43]

Q. Are you familiar with the document of waiver dated 8 December, 1955, when you were cleared for the Army, the Navy and the Marine Corps, Mr. Korte?

A. Yes, I have seen it two or three times.

Q. And you did receive notice of this waiver?

A. I believe so.

Mr. Wertheimer: I would like to read, your Honor, briefly, into the record, from the FBI report, on page 4 (reading):

“In July, 1953, the registrant was found guilty of violation of the Selective Service Act and was sentenced to 18 months imprisonment. The registrant’s sentence was stayed until August 3, 1953, so that he could attend the International Conference of Jehovah’s Witnesses at New York City. The registrant was paroled from McNeil Island on March 24, 1954. The registrant was due to be released on April 15, 1954, but he earned 22 days for good behavior. His parole was terminated on February 2, 1955. The registrant’s prison and parole records are good and reflect that the registrant was in no difficulty, and that he appeared to be a law-abiding citizen, and that his future adjustment would be good.”

From that same document, I believe it indicates his early history, which was omitted when counsel read from the same document (reading): [44]

“The registrant attended Polytechnic High School

(Testimony of Robert Lee Korte, Jr.)

at San Francisco, California, from February, 1947, to February, 1951, at which time he was graduated. School records reflect that the registrant was an above-average student; that he was a member of the basketball team and president of the student body during his senior year."

Counsel from the government also read from an interrogatory dated October 18, 1956. It should be pointed out that the record also contains a note at the bottom, your Honor, saying that (reading):

"The foregoing was compiled from notes taken during the meeting and is not intended to be verbatim."——

only to give the sense. I indicate this at this time because when Mr. Constine read the question I think there was some lack of clarity in it. He read (reading):

"Could you not continue to do this type of work if ordered to do so?"——

referring to cleaning swimming pools, the work he is doing now.

Mr. Korte answered at that time (reading):

"Yes, but I could not compromise my position at this time to do so."

This being not verbatim did not actually reflect what Mr. Korte informs me was in his mind at the time, and while he is [45] on the stand I would like him to explain briefly to his Honor as far as the type of work that you would be involved in, were you given the opportunity to do so——

(Testimony of Robert Lee Korte, Jr.)

Q. Would you continue, et cetera?

A. The way the question was asked, he asked what I was doing at present to support myself, secularly. I mentioned I was doing maintenance work in relation to swimming pools. So then he mentioned as to whether or not I would like to continue doing maintenance work if I was ordered to do so by the local board, or by any appeal board of the government. And my thought on that was that the maintenance work he had in mind was what they had been talking about all along, was that of a helper of some type in the Department of Charities in Los Angeles, or some place else. And so I said—what I meant to say was no, I wouldn't do that; I wouldn't take care of something in a government institution some place. I would be willing to stay in the swimming pool business, as far as that goes, but——

The Court: Would you be willing, if you had an opportunity, to comply with the law in that respect?

A. Well, only in the sense that I couldn't go beyond my principles, because since I am a minister, at least in the eyes of myself, of God and our Society, why, if I am forced to give up that position through government order, to compromise no, I couldn't do that conscientiously. [46]

The Court: Well, I will say for your benefit, so that you may think about it, at least, without committing myself definitely, this record discloses that unless you are willing and able to avail yourself of that opportunity, my duty is clear. But I will give counsel an opportunity to disabuse my mind of that

(Testimony of Robert Lee Korte, Jr.)

at the proper time, so you build up your record so you will have a proper record.

The Court: Proceed.

Mr. Wertheimer: I have no further questions at this time, your Honor.

Mr. Constine: I just have a very few. I wanted to ask just a few questions.

Cross-Examination

By Mr. Constine:

Q. Mr. Korte, you stated that you served 18 months at McNeil Penitentiary?

A. No; I was sentenced to 18. I served about eight.

Q. About eight months? A. Yes.

Q. Mr. Korte, in April—between April and July, 1956, when you were classified 1-O, you were at that time performing about 40 hours a week secular employment, is that correct? A. That is correct.

Q. In other words, about eight hours a day, five days a week? A. Correct.

Q. And that was a job you were receiving a salary for at that [47] time? A. Correct.

Q. And you advised the draft board of that fact, is that true? A. Yes.

Q. And you were not a so-called Pioneer minister at that time, were you? A. No, I was not.

Q. In fact, you, through responsibilities, were not able to devote as much time to Jehovah's Witness activities as you had previously?

A. That's true.

(Testimony of Robert Lee Korte, Jr.)

Q. So then when you were classified 1-O in July, 1956, you did have at least secular employment that averaged about 40 hours a week? A. Yes.

Q. Now, may I ask you this question: Would you not be able at the present time to perform work in some charitable hospital or institution not run by the government, but say by a county or city, or by some charitable organization?

A. Well, the way I understand this is that this would be in lieu of induction for the purpose of performing a job that would be of benefit in some way to the County, the State, or the Federal Government, and I feel that my position of acting as a minister in my own particular community and locality is [48] of far greater importance, ministering to the spiritual welfare of the people in that community, than to work some place in a hospital as a helper, or whatever it might be.

Q. But if the Selective Service System, as it has here, has failed to recognize your ministerial classification, and you say, yourself, at the time you were classified you had a full-time job, could you not benefit mankind by ministering to the sick or the mentally ill? Could you not find that within your principles to perform? For example, work in a mental institution, or helping people who are ill, rather than serving the military? Would that compromise your principles too much to do so?

A. Yes, I believe it would.

Q. And you say at the present time you are a Pioneer, as of this date? A. That is correct.

(Testimony of Robert Lee Korte, Jr.)

Q. You haven't advised your draft board of that?

A. I don't believe so. It has only been about two months, now.

Q. Two months? A. Yes.

Q. Since you were indicted?

A. I think so.

Q. You were indicted in March, '57?

A. Yes. I began April 1st.

Q. Subsequent to your indictment? [49]

A. Correct.

Q. Up to that time you were performing approximately 40 hours a week, would you say, secular employment? A. Yes.

Q. However, subsequent to your indictment you gave up a portion of your secular employment?

A. Well, my attitude all along—I think it was stated many times in the file—that as soon as we were able financially for either my wife or myself to re-enter the full-time ministry, that's what we would do. We neglected entering before because of this reason—although I will admit it looks very coincidental that I began my Pioneer work after my indictment, and that is not meant to be that way. I would rather that not even be taken into consideration, that I am a full-time minister now, in this sense, because the way I have felt about it is that if I just kept putting off and putting it off because of what we are going through with the government here, why, I might never get back into it. So even though it is only for a month or two, I might just as well take advantage of it.

(Testimony of Robert Lee Korte, Jr.)

Q. So it is fair to say that at the time you were classified by the board, at the time you answered the questionnaire, and at the time of the FBI investigation, you were not a full-time minister at that time?

A. No, I wasn't. [50]

Q. And your vocation was that of certain secular work; you were doing your religious work at whatever time was left in the evening, is that the situation?

A. Well, the way I view what a vocation is, to me a person's vocation is a person's life work. My life work is the ministry, whether it is 40 hours a week or four million; that still is my vocation. And secular activities I would view as my vocation, although you might disagree. In the early days of this country when the pioneers were moving westward, the ministers that went with them worked generally six days a week to support themselves, because their flocks couldn't support them, and on the seventh day they were ministers.

The Court: What year was that?

A. It was quite some time back. I guess it was in the 1800's.

Q. Things have changed.

A. Yes, that's true.

Q. (By Mr. Constine): Some of these same ministers were not opposed necessarily to war in any form in the example that you give where ministers worked——

Mr. Wertheimer: I object to the question, your Honor, as argumentative.

(Testimony of Robert Lee Korte, Jr.)

Mr. Constine: I will withdraw it, your Honor. I have no further questions.

The Court: You may proceed. [51]

Redirect Examination

By Mr. Wertheimer:

Q. You were in the full-time ministry in what years, Mr. Korte?

A. In 1952, 1953, 1954 and presently.

Q. You are presently in the full-time ministry?

A. Yes. I might explain, at the moment, if I might, the reason this wasn't continued through was, and it is not the policy of our organization to give financial remuneration to its ministers. We serve voluntarily. So it is always necessary to have some type of employment to support ourselves and to support our ministry. Otherwise we would spend all our time in the ministry. But we have families, and scripturally our obligations are to our families to keep them clothed and fed, and so forth.

Q. But at the present time your major occupation is that of a Pioneer? A. Yes.

Q. And how many hours did you indicate, including study and service, are you putting in at present?

A. Oh, at least 150 a month.

Mr. Wertheimer: I have no further questions at this time.

Mr. Constine: I have no further questions.

The Court: What does your family consist of?

A. My wife and myself.

Q. Are your father and mother living? [52]

(Testimony of Robert Lee Korte, Jr.)

A. Yes, they are.

Q. Where are they located?

A. They live in San Francisco.

Q. What is the business or occupation of your father?

A. I don't know, your Honor; I haven't seen him for about three years.

Q. Why?

A. I haven't seen him for about three years.

Q. What was his business or occupation?

A. Well, the last job that I remember that he had held for quite some time, he worked with Shell Oil Company in San Francisco.

Q. In what capacity?

A. Accountant, I think he was.

Q. Did you have any discussion of religion with him? A. I attempted to, yes.

Q. With what result?

A. Negative. He was very narrow minded along certain lines.

Q. Why?

A. I say he was very narrow-minded along certain lines.

Q. I am not prepared to say that you are not a pretty good match for him in that respect. You sit there and indicate how the things should be arranged and under what conditions, and you are sitting in judgment as against all these investigations, and the law, itself. [53] A. My only——

Q. Your state of mind is contrary to every phase of the law, itself.

(Testimony of Robert Lee Korte, Jr.)

A. My only answer to that, your Honor, would be to call to your Honor's attention a like situation that arose quite some time back when St. Peter was engaged in his ministry activity, and he and his followers were brought before the Jewish Supreme Court and were told that they were to stop teaching on the basis of this name because they were going around disrupting everything, and they disagreed with everything.

Q. But the law was passed to take care of those who didn't want to participate physically in war, and they spelled out a program for everybody, keeping in mind all conditions as available. You wouldn't have to do anything; only be of assistance to those that need some help—hospitals, and such work—and you serve your time, and you owe that to your country the same as everyone else does, no matter what the religion. Boys that went on and paid the supreme sacrifice are to be thought of.

However, the reason I am talking to you, you have had an education. You have a mental capacity to realize fully the situation you are confronted with, and I would very much like to help you if you would give me an opportunity. If you don't, I can state to you my duty seems to be clear. Not because I am anxious to commit anyone to prison—I would sooner do [54] otherwise—but if there is nothing left for me to do, I shall have to do my duty in that respect.

You had better think about it, and step down.

A. Thank you, your Honor.

(Witness excused.)

Mr. Wertheimer: That closes the defendant's case, your Honor.

I would like to make a motion at this time.

The Court: You may.

Mr. Wertheimer: May it please the Court, the evidence as presented by the government and by the defendant indicates that the defendant is not guilty as charged; that the classification by the appeal board on July 20, 1956, was arbitrary and capricious, and contrary to law, in that it ignored the section of the Selective Service Regulation 1622.44 defining the 4-F classification, Subparagraph (c); that this determination in July of 1956 was improper and without basis in fact, because the evidence has shown that the defendant has been convicted of a felony and had served time in a federal penitentiary, and therefore the 1-O classification was arbitrary and capricious, contrary to law, and contrary to the Selective Service Act of 1948, Section 456, Subsection (m), indicating that no person shall be relieved from training under the title by reason of a conviction of a criminal offense except where the offense is punishable by death or by imprisonment for more [55] than one year. Therefore, the final order to a civilian to do civilian work is void.

Secondly, our motion for acquittal is based on the fact that at the time of the 1-O classification in July of 1956, the classification procedure commanded by the regulations under 1623.2 indicates that the appeal board failed to come up from the bottom of the list, from 1-C to Classification 4-F, but on the

contrary, went down the list from 1-AO to 1-O, conscientious objector.

The Court: I don't follow that process of reasoning clearly. You might elaborate on that.

Mr. Wertheimer: All right, your Honor.

In Section 1623.2 of the Regulations——

Mr. Constine: May it please your Honor, we will concede this fact—this is what counsel is saying: A man is entitled to the highest classification. For example, if the draft board classifies a man 1-O, a conscientious objector, and at the time he is a full-time minister and entitled to the 4-D classification, he should receive the 4-D classification, or as counsel points out, he has been convicted of a felony, he is entitled to the 4-F classification. If he is entitled to a higher classification, he should receive the highest classification—that is, assuming he is entitled to that particular classification. If it is conceded for the purpose of the argument that the man is a full-time minister and a [56] conscientious objector, he should be classified as a full-time minister. I think that is what counsel stated.

Mr. Wertheimer: Not quite. I would like to read the regulations.

The Court: You may.

Mr. Wertheimer: So the record is clear, again. 1623.2 of the Regulations states (reading):

“Consideration of Classes.

“Every registrant shall be placed in Class 1-A under the provisions of 1522.1 of this Chapter except where grounds are established to place the registrant in one or more of the classes listed in the following

table, the registrant shall be classified in the lowest class for which he is determined to be eligible”——

the lowest class (reading):

——“with Class 1-AO considered the highest class. and Class 1-C considered the lowest according to the following table:”——

I think if your Honor would take a glimpse at the regulation——

The Court: Give it to the clerk.

Mr. Wertheimer: ——1623.2.

The Court: You may read it.

Mr. Wertheimer: When you have read 1623.2 you can see that [57] it is our contention that you go up from the bottom of the list, because the top is in 1-A——

The Court: I don't see it in this pamphlet.

Mr. Wertheimer: 1623.2.

The Court: 1623.2. The lower paragraph?

Mr. Wertheimer: That is correct. There it gives the list of classifications, and it indicates that rather than starting at the top of the list——

The Court: That is Class 1-A——

Mr. Wertheimer: If he is not eligible for 1-A—in this case Robert Korte was designated 1-O, and therefore he is not to be classified as 1-A—if he is not 1-A, you are to begin at the bottom of the list, 1-C, and work your way up. And we believe that, on the contrary, the classification board started at 1-AO and then classified him 1-O, where in fact, having been convicted of a crime, they should have started at 1-C and worked their way up, as it is commanded in the regulation, to give him the first category for

which he is eligible, and stopped at 4-F. Therefore we say that the final classification is arbitrary and contrary to law, and the final order to report to the Los Angeles Department of Charities for civilian work is void.

In our motion for judgment of acquittal we state again that the armed forces waiver of September, 1955, is not sufficient to make him liable for performance of civilian work, as [58] there is no provision, either in the Act or the Regulations, for the armed forces to waive a disqualification for a place in civilian employment, as the armed forces waiver is good, as stated in the waiver itself, for military service, and therefore the final order commanding the registrant to report to the Los Angeles Department of Charities, is void.

In our case, the registrant was not classified for military service, but was ordered to do civilian work; therefore the waiver of physical examination is not the same as a waiver by the local board or the Los Angeles Department of Charities.

Lastly, there is no basis in fact for the classification; it is contrary to law, arbitrary and capricious, and void, because the Selective Service failed to get a waiver of conviction from the Los Angeles Department of Charities, themselves. There is nothing in the file to show that the defendant is acceptable to the Los Angeles Department of Charities notwithstanding his conviction, and that there is no legal basis for the order for him to report for civilian work.

It is on these contentions, in view of the fact that

Mr. Korte having served a sentence prior to this in a federal penitentiary, that we move at this time for a judgment of acquittal.

The Court: This situation requires further study. I am going to take an adjournment until eleven o'clock tomorrow [59] morning. I have a matter on at 10:00. Both sides may prepare any future argument they may wish to present, at which time I shall make a determination on this case.

(Further discussion by counsel not ordered transcribed for this record.)

(Whereupon an adjournment was taken until Tuesday, June 4, 1957, at 11:00 o'clock [59-A] a.m.)

Tuesday, June 4, 1957—11:00 A.M.

(Following argument by counsel for the respective parties not ordered transcribed for this record, the following proceedings were had:)

The Court: Is the matter submitted?

Mr. Wertheimer: Submitted, your Honor.

The Court: As the case now stands submitted—I reviewed the case in its entirety—the Court will enter a judgment of guilty as charged in the indictment.

Do you think your client would avail himself of the charity that the law provides?

Mr. Wertheimer: Are you speaking, your Honor, of——

The Court: Civilian activity.

Mr. Wertheimer: It is the defendant's contention that that is not acceptable to him, your Honor.

I should like to move at this time that until the time of sentence his bail be continued as it is. The government does not object.

Mr. Constine: Do I understand that counsel now moves to have the matter referred to the probation officer for his presentence report?

Mr. Wertheimer: I would appreciate that, your Honor.

Mr. Constine: We have no objection to that, your Honor.

The Court: There is not much of a report you can make. [60]

Mr. Constine: I think all the facts are before your Honor.

The Court: However, I don't want to deny him any opportunity that is available to anyone else.

Mr. Wertheimer: We move that the matter be referred, then, to the probation officer.

The Probation Officer: Two weeks, your Honor—June 18th?

Mr. Constine: Is that agreeable?

Mr. Wertheimer: June 18th?

Mr. Constine: Whatever date is agreeable to counsel, your Honor, and the Court.

Mr. Wertheimer: I would prefer a little bit before that, or a little after.

The Court: A little before what?

Mr. Wertheimer: Before the 18th—the day before, or, preferably, June 24th.

The Court: I will give you the 17th, if you want the day before.

Mr. Wertheimer: Thank you.

The Court: Is that agreeable, counsel?

Mr. Constine: Is that agreeable?

Mr. Wertheimer: That is.

Mr. Constine: There is a problem of bail, your Honor. He is presently, I believe, on \$500 bond.

Mr. Wertheimer: That is correct.

The Court: Do you recommend that the bail be \$500? [61]

Mr. Constine: He is on that now. I don't know if counsel desires that he remain on bail pending judgment.

Mr. Wertheimer: I move that he remain on bail pending judgment at this time.

The Court: The rule of this Court has been when a defendant is found guilty—and I don't make any exceptions of it—he is ordered into custody until the case is disposed of.

Mr. Wertheimer: Isn't it possible, pending the probation report and pending sentence, that the bail be continued? Do you have discretion in that matter?

The Court: I have discretion in the matter, there is no doubt about it, but I have always tried to treat all these defendants, insofar as I can, in the same way. I have ordered them all into custody after a full hearing.

Mr. Wertheimer: If you make judgment and sentence at this time, your Honor, would it be possible to request a stay of execution?

The Court: Oh, yes. You are entitled to that under the law.

Mr. Wertheimer: Could I confer with my client for just one moment?

The Court: Certainly.

Mr. Constine: Would your Honor desire to take a recess for a few moments?

The Court: No. I will give him plenty of [62] time.

I haven't talked to the wife. With your permission I will call her to the stand.

Mr. Wertheimer: Certainly, your Honor.

The Court: Step forward.

MRS. ROBERT LEE KORTE, JR.

was called as a witness on behalf of the defendant, and, after being first duly sworn, testified as follows:

The Court: Be seated. You needn't answer any questions you don't wish to answer. It is only that I wish to get your state of mind in relation to your husband.

The Court, after hearing all the testimony, concluded that your husband violated the law. There is nothing for me to do but to sentence him, unless he wants to avail himself of the opportunity to do any civilian work.

The Witness: I think my husband has made his statement.

The Court: What is it?

A. I believe that he has said what he desires. I agree with his wishes, since he is the head of the house, and I am in full accord with it.

(Testimony of Mrs. Robert Lee Korte, Jr.)

Q. We live in a country where if everyone takes this law and violated it in the manner it has been violated here, we wouldn't have any country at all; the Russians and the rest of them would come over here, and it would be an invitation for them to come, and we would be lucky to get enough to eat. [63] Coupled with that, young men of this young man's age, and over, have paid the extreme penalty by their lives to sustain what we have.

History records these changes from time to time, from century to century, and we have to conform to the law if we hope to maintain what we have got. It is as simple as that. There is no mystery about it at all—no mystery about it at all.

And tell me, have you met the defendant's father and mother?

A. I have met his mother; I don't know his father.

Q. And what does his father do? What is his occupation, do you know?

A. I really don't know. I have talked with him on the phone, but I have never met him, nor have I ever seen him. I know his mother. He has a very nice mother. She is a very nice person.

Q. I am happy to hear you say that.

(Addressing defendant): Tell me, what does your father do? What is his occupation?

The Defendant: I don't know, your Honor, for the reason that I haven't seen him for three years, as I mentioned.

The Court: When you did see him, what was he engaged in? What did he do?

(Testimony of Mrs. Robert Lee Korte, Jr.)

The Defendant: He was working for Shell Oil at the time. [64]

The Court: How long has he worked for Shell Oil?

The Defendant: Up to that time he worked for them for about 25 years.

The Court: Twenty-five years?

The Defendant: Yes.

The Court: And he maintained you in school, did he not?

The Defendant: That is correct.

The Court: And the education you got, your father made it possible for you to get that education, did he not?

The Defendant: Partly. I worked during summer vacations to accumulate and finance myself partly.

The Court: Partly?

The Defendant: Yes.

The Court: That wasn't a great deal, was it?

The Defendant: No.

The Court: Well, I was sorry to see you—I didn't know your father and I don't know him now, but I learned long ago as a youngster to honor my father and my mother, and a boy who doesn't do that—keep it in mind—will have time to remember it for a long, long time.

The penalty here is five years in the penitentiary, or \$10,000 fine, or both. That is what you are confronted with, young man. I want you to know it now. You can't go around and interpret the law to suit

and mother in every way that I could, except when they wanted me to do things that I thought were not right—not to appear to be smart in my own conceit——

The Court: Let's go to your mother. Have you respect for your mother?

The Defendant: Certainly.

The Court: And you haven't seen her for three years?

The Defendant: No; I just saw her day before yesterday.

The Court: Yes. And what did she say to you about the situation you find yourself in?

The Defendant: Well, she naturally doesn't agree with my particular viewpoint.

The Court: I am not surprised.

Who sentenced you?

Mr. Constine: It was former Judge Monroe Friedman, your Honor.

The Court: What was the sentence at that time?

Mr. Constine: It was 18 months.

Mr. Wertheimer: Of that 18 months the defendant served approximately eight months, and received some time off, as I [68] think you read in the record.

The Court: Do you want to say anything in relation to punishment?

The Defendant: No, your Honor.

The Court: I am speaking to your attorney.

The Defendant: Excuse me.

Mr. Wertheimer: I have indicated throughout the trial and the comments on the evidence, your

Honor, and I should like to bring your attention at this time as well, that, in view of the fact that the defendant has already served time; that his record has been an exemplary one; that throughout his sentence at McNeil Island he indicated co-operation, and his record showed that he did, I feel that any leniency that you might show at this time, of course, would be appreciated, and we request it of your Honor.

The Court: I will hear from the government.

Mr. Constine: Your Honor, we have no particular recommendation to make. I would say to your Honor that we would have no objection to probation if the defendant was willing to accept some civilian work in lieu of induction, and if he would obey the order, even at this time, we would agree that he should be permitted to do so, as any defendant who may submit to induction after conviction. We would have no objection to that. But he takes the position he will not, so I think there is no alternative for your Honor. [69]

Mr. Wertheimer: I think I might comment also, so that the record might be clear, that any consideration you would have regarding probation at this time would be appreciated, also, your Honor.

The Court: I will put the case over to the 17th, and I will get a report from the Probation Department and make a final determination at that time.

You will go into custody, young man.

(Whereupon, the matter was continued to Monday, June 17, 1957.) [70]

and for the record, and request at this time, pursuant to Rule 46 of the Criminal Procedure Rules, that bail be continued during the pending of the appeal.

Mr. Constine: It is our position, your Honor, that there is no real issue in this case. However, the question of bail on appeal is entirely within your Honor's discretion, and we will simply submit it. The rule has been somewhat liberalized recently. It used to be unless there was a substantial question a defendant was not allowed bail on appeal. The rule has now been liberalized to the point that it reads that unless the appeal is frivolous, bail should be allowed. But the Appellate Court still takes the position that there must be some question, or some serious issue.

The Court: What is the position of the government in relation to bail?

Mr. Constine: I might state this: In many cases that we oppose bail on appeal in the District Court, and the Appellate Court allows it anyway. [73]

The Court: What is that?

Mr. Constine: In many cases in which we oppose bail on appeal in the District Court, the Appellate Court allows bail anyway, your Honor. But to be honest with your Honor, I don't think there is any question for appeal here, although I may be disagreed with further on. In any event, we would oppose bail on appeal at this juncture.

Mr. Wertheimer: Your Honor, we raised some points which we feel three, at least, have validity, in view of the new position of the Court. This, by

no means, is a frivolous act being done for the purpose of just continuing the matter on appeal. We are serious, as far as taking this matter to the higher court. And in view of the fact that this is not a frivolous one, it is our request that bail be continued.

The Court: What is the bail now?

Mr. Constine: The defendant, your Honor, has been on \$500 bail.

Mr. Wertheimer: That is correct.

Mr. Constine: He has attended all the hearings. I don't think there is any question he will flee the jurisdiction.

The Court: The bail, then, will remain at \$500.

Mr. Constine: That is on appeal.

Mr. Wertheimer: Thank you, your Honor.

Mr. Constine: Will you post that bail today? There will have to be an appeal bond. [74]

Mr. Wertheimer: We will do so.

The Court: Very well.

Mr. Wertheimer: Thank you.

Certificate of Reporter

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 74 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting to the best of our ability.

/s/ W. A. FOSTER,

/s/ JOSEPH F. SWEENEY.

[Endorsed]: Filed September 3, 1957. [74-A]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE
RAISED ON APPEAL

1. The Appeal Board denied the IV-F classification required by Section 1622.2 of the Selective Service Regulations without basis in fact, as evidence showed defendant had been previously convicted of a felony. Therefore I-O classification is arbitrary, capricious, and contrary to law, resulting in the final assignment and order to do civilian work being void.

2. The Appeal Board arbitrarily and capriciously failed to follow the classification procedure commanded by Section 1623.2 in failing to come up from the bottom of the list of classifications from I-C to IV-F but, on the contrary, went down the list of classifications from I-A-O to the I-O classification and entirely ignored the IV-F classification completely, all of which is contrary to Section 1623.2 of the Selective Service Regulations, resulting in the final classification being arbitrary, capricious and contrary to law, making the final order to report for civilian work void.

3. The Armed Forces waiver dated September 9, 1955, is not sufficient to make the defendant liable for the performance of civilian work because there is no provision in the Act or the Regulations for the Armed Forces to waive the disqualification for a place of civilian employment, but the Armed Forces waiver is good only for military service and, there-

fore, the final order commanding the defendant to perform civilian work is void.

4. The final order commanding the defendant to report for civilian work with the Los Angeles Department of Charities is void because the Selective Service System failed to get a waiver of the conviction from the Los Angeles Department of Charities, the place of employment, and since there is nothing in the file to show that the defendant was acceptable notwithstanding his conviction there was no legal basis for the order to report for civilian work.

A copy of this statement has been sent to United States Attorney Lloyd Burke.

Dated: August 16, 1957.

SMALL AND WERTHIMER,

By /s/ RICHARD J. WERTHIMER,
Attorneys for Defendant.

[Endorsed]: Filed August 20, 1957.

United States Court of Appeals
for the Ninth Circuit

Case No. 15673

ROBERT LEE KORTE,

Appellant-Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent-Plaintiff.

STIPULATION

It Is Hereby Stipulated that the Selective Service file in the above-entitled matter be considered in its original form without necessity of reproduction in the printed record.

SMALL AND WERTHIMER,

By /s/ RICHARD J. WERTHIMER,
Attorneys for Appellant.

By /s/ DONALD B. CONSTINE,
Assistant U. S. Attorney,
Attorney for Respondent.

[Endorsed]: Filed September 26, 1957.

No. 15673

United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT LEE KORTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

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345 Franklin Street
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Counsel for Appellant

FILE

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No. 15673

United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT LEE KORTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. [R. 6-8]¹ The District Court had jurisdiction under Title 18, § 3231, U. S. C. A. The indictment charged an offense against the Universal Military Training and Service Act

¹ Numbers appearing herein within brackets preceded by "R." refer to pages of the printed transcript of record filed herein.

(50 U. S. C. A. App. § 462). [R. 3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (3) of the Federal Rules of Criminal Procedure because the notice of appeal was filed in the time and manner required by law. [R. 7-8]

STATUTES INVOLVED

Section 6(m) of the Act (50 U. S. C. A. App. § 456(m)) provides as follows:

“No person shall be relieved from training and service under this title [sections 461-454 and 455-471 of this Appendix] by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.”

Section 12(a) of the Act (50 U. S. C. A. App. § 462(a)) provides:

“... Any ... person ... who ... refuses ... service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title ... shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment ...”

REGULATIONS INVOLVED

Section 1622.44 of the Selective Service Regulations (32 C. F. R. § 1622.44; E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

“*Class IV-F: Physically, mentally, or morally unfit.* In Class IV-F shall be placed any registrant (a) who is found

to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation.”

Section 1623.2 of the Selective Service Regulations (32 C. F. R. § 1623.2; E. O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

“Consideration of classes. Every registrant shall be placed in Class I-A under the provisions of § 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class :

| | |
|-------|------|
| I-A-O | IV-A |
| I-O | IV-B |
| I-S | IV-C |
| II-A | IV-D |
| II-C | IV-F |
| II-S | V-A |
| I-D | I-W |
| III-A | I-C” |

Section 1626.26 (a) of the Selective Service Regulations (32 C. F. R. § 1626.26 (a) ; E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, redesignated at 14 F. R. 5021, Aug. 13, 1949) reads as follows :

“The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.”

STATEMENT OF THE CASE

Appellant was charged by indictment, which alleged he did “on or about the 26th day of November, 1956, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 40, to report to his said Local Board No. 40 to be given instructions to proceed to a place of employment designated by said Local Board No. 40 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto.” [R. 4] Appellant pleaded not guilty and waived the right of trial by jury. [R. 5]

The case proceeded to trial on June 3, 1957. [R. 9] The entire draft board file was received into evidence as Government's Exhibit No. 1. [R. 9] It was stipulated that the appellant failed to report to his local board, as ordered on November 26, 1956. [R. 10] Pertinent parts of the draft board file were read into the evidence. [R. 11-34] Appellant testified in his own behalf. [R. 40-55]

Appellant registered with his local board on March 28, 1951, and on December 22, 1951, filed his classification questionnaire. (F. 6)² He showed that he was a student at the University of California. (F. 11) He certified that he was a conscientious objector. He filed a conscientious objector form on April 21, 1952. (F. 12, 252-254) He was classified I-A by his local board and appealed to the appeal board. (F. 13) His case was referred to the Department of Justice for investigation. (F. 228) Following a hearing in the Department of Justice a recommendation was made to the appeal board resulting in a I-A classification. (F. 5, 228-230, 239)

When ordered to report for induction he refused to submit to induction on April 28, 1953. (F. 217-224, 239) He was indicted on May 13, 1953. (F. 212) He pleaded not guilty on June 17, 1953. (F. 211) On July 3, 1953, he was convicted of a felony and sentenced to the custody of the Attorney General for a period of 18 months. (F. 208-209) [R. 9-10, 14-15, 23, 40-41, 46, 49] On August 3, 1953, the appellant commenced serving his time in the custody of the Attorney General pursuant to the judgment of conviction. (F. 206-207) [R. 46]

Appellant was released from the custody of the Attorney General on March 24, 1954, and stayed on parole until February 2, 1955. [R. 46] During this period of time he was classified IV-F on September 11, 1953. [R. 13, 15] (F. 200)

Two days after the date of expiration of appellant's parole the local board on February 4, 1955, classified him I-A. (F. 13) [R. 15-16] On February 11, 1955, a special form for conscientious objector (Form No. 150) was mailed to the appellant, requiring him to give additional information. (F. 14, 189) The appellant filled out the conscientious objector form and showed the same information as before except he added that he had been arrested, convicted and sent to

² Numbers preceded by "F." appearing in *parentheses* herein refer to the pages of the draft board file (Government's Exhibit 1). Such page numbers, written in longhand, appear at the top of each page of the file.

the federal prison because of his stand as one of Jehovah's Witnesses against military service. (F. 186, 191-194) He filed additional information showing his ministerial activity and corroborating his claim for classification as a minister of religion. (F. 154-185) He filed a special claim for classification as a minister. (F. 143-153) This was accompanied by statements corroborating his ministerial activity. (F. 137-142) He also filed information answering a special questionnaire about his religious affiliation and activity. (F. 125-135)

The local board on April 1, 1955, classified him I-A. (F. 114) Appellant appealed to the appeal board. (F. 14, 124) His case was referred to the Department of Justice. The investigation by the FBI and the recommendation of the Department of Justice showed the appellant's sincerity as a conscientious objector, as well as his having been convicted of a felony and serving 18 months in prison. (F. 56-80, 112-121) [R. 23, 25-26]

While the appellant's case was pending before the appeal board he was on August 30, 1955, ordered to take a physical examination on September 9, 1955. (F. 99) He took the physical examination and was found acceptable, and in addition the armed forces examiner stamped upon the order an army waiver of the appellant's prior conviction for a felony. (F. 83-96) On December 20, 1955, the appellant was notified of his physical acceptability for military service. (F. 14) [R. 21] The Department of Justice on September 29, 1956, recommended to the appeal board that the appellant be classified as a conscientious objector. (F. 56-80) The appeal board on July 20, 1956, classified the appellant I-O. (F. 4)

The appellant refused to designate a type of civilian work that he wanted to do as a conscientious objector pursuant to the request of the local board. (F. 43-44) The local board then offered appellant three types of civilian work to choose from but he refused to do this. (F. 38-40) The appellant was requested to appear before the local board for a

special hearing with a representative of the state headquarters in an effort to reach an agreement as to the type of work he would be willing to accept as a conscientious objector. (F. 14, 28, 31) The appellant stated his reasons for refusal to do civilian work. (F. 26-27) The Director of Selective Service approved the issuance of an order commanding the appellant to do civilian work. (F. 24) The local board ordered the appellant to report to Los Angeles County Department of Charities to do civilian work on November 28, 1956. (F. 14, 20) The appellant failed to report to the local board. (F. 14, 20)[R. 10]

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the appeal board denied the IV-F classification without basis in fact contrary to Section 1622.44 of the Selective Service Regulations, resulting in the I-O classification being arbitrary, capricious and contrary to law and making the final order to do civilian work void.

This question was raised in the motion for judgment of acquittal. [R. 35, 56]

II.

Whether the appeal board arbitrarily and capriciously failed to follow the classification procedure commanded by Section 1623.2 by failing to come up from the bottom of the list of classifications from I-C up to IV-F but went down the list of classifications from I-A-O to I-O and ignored the IV-F classification, making the final order to do civilian work void.

This question was raised by the motion for judgment of acquittal. [R. 36-37, 56-57]

SPECIFICATION OF ERROR

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of the government's case and renewed at the close of all of the evidence. [R. 36-39, 56-60] The court denied the motion. [R. 39, 60-61] Grounds in the motion are made the basis of the statement of points to be raised on appeal. [R. 76-77]

ARGUMENT

ONE

The appeal board denied the IV-F classification without basis in fact contrary to Section 1622.44 of the Selective Service Regulations, resulting in the I-O classification being arbitrary, capricious and contrary to law and making the final order to do civilian work void.

Section 6 (m) of the Act (50 U. S. C. A. App. § 456 (m)) in the proviso clause thereof relieves from "training and service" any person who has been convicted of a felony. The undisputed evidence in this case shows that the appellant was previously convicted of a felony in the United States District Court for the Northern District of California, Southern Division, on July 3, 1953, and sentenced to serve a term of 18 months in the custody of the Attorney General on July 14, 1953. (F. 209)[R. 14-16, 23, 46]

The armed forces waiver of the moral disqualification because of conviction appearing in the draft board file and dated September 9, 1955 (F. 83-96) was not basis in fact for the I-O classification of July 20, 1956, by the appeal board. (F. 4) Section 1622.44 (b) of the Regulations (32 C. F. R. § 1622.44 (b)) deals with persons who are found to be "morally unacceptable for any service in the armed forces" by the Secretary of Defense. Subdivision (b) of Section 1622.44 of the Regulation (32 C. F. R. § 1622.44) does not deal with convictions of felonies but relates only to morals and other

felony convictions. Subdivision (c) of the Regulation deals with persons who are convicted of felonies. However, it goes on to add that the person must also not be “eligible for classification into a class available for service.” This particular addition to the language appearing in the Act (50 U. S. C. A. App. § 456 (m)) is ambiguous. If the Regulation be construed that a person who has been convicted of a felony to be eligible to the IV-F classification must also be otherwise not eligible for classification for service, then it is in conflict with the statute and of no force and effect and it cannot be used as a basis for a denial of the IV-F classification.

The armed forces waiver prescribed by subdivision (b) is not equivalent to a denial of the rights prescribed by the Act (50 U. S. C. A. App. § 456 (m)) to a IV-F classification since the statute disqualifies a person who has been convicted of a felony. If it be contended that the armed forces waiver of disqualification constitutes a waiver of conviction then the appellant takes the position that such waiver, subsection (b) of the Regulation and the regulations of the armed forces prescribed by the Secretary of Defense to that effect are void because they are in conflict with *Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954).

A reasonable interpretation to be made of the Regulation (32 C. F. R. § 1622.44 (b)) prescribing the power of the Secretary of Defense to accept persons otherwise morally unfit is that subdivision (b) of the Regulation does not relate to persons convicted of felonies. It is confined to persons otherwise not morally acceptable to the armed forces.

In the event that the Regulation is construed otherwise so as to authorize the Secretary of Defense to find persons convicted of felonies morally acceptable and thus make such acceptance basis in fact for the denial of the IV-F classification, then appellant takes the position that the Regulation is in conflict with the Act (50 U. S. C. A. App. § 456 (m)) or ultra vires, thus making the classification based upon such action arbitrary and capricious and con-

stituting no basis in fact for the denial of the IV-F classification.

In the event that it is argued that subdivision (c) of the Regulation (32 C. F. R. § 1622.44 (c)) prescribing the disqualification of a person convicted of a felony by making it contingent upon such person's being otherwise ineligible for service, then such construction makes the Regulation *ultra vires*. It constitutes, therefore, an illegal amendment by the Regulation (32 C. F. R. § 1622.44) of an Act of Congress (50 U. S. C. A. App. § 456 (m)) in violation of the law.—*Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954).

A more reasonable interpretation of such ambiguous regulation is that a person who has been convicted of a felony is not eligible for classification for service. This reasonable interpretation of that subdivision of the Regulation in order to avoid bringing the Regulation in conflict with the statute and being void must be accepted by the Court. Where a regulation can be given a reasonable interpretation so as to avoid a declaration of its invalidity it should be thus interpreted.

This interpretation commanded by the law to avoid a declaration of invalidity means that the word "who" following the word "and" and preceding the words "is not eligible" appearing in subdivision (c) of Section 1622.44 of the Regulation is mere surplussage. In the event that the Court does not accept this interpretation but construes the Regulation so as to authorize a holding that there was basis in fact for the denial of the IV-F classification then the appellant says that such Regulation is void because it is in conflict with the Act (50 U. S. C. A. App. § 456 (m)) disqualifying from service all persons who have been convicted of a felony.—*Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954).

It may be argued by the Government that the contention hereinabove made, that subdivision (b) of Section 1622.44 does not extend to convictions of felonies, and that subdivision (c) of Section 1622.44 is ambiguous, was not ex-

pressly raised in the court below and therefore cannot be here considered. It is submitted that the appellant's contention in the trial court that there was no basis in fact for the denial of the IV-F classification and that the appeal board was arbitrary, capricious and contrary to law, is adequate to support the contentions above made.

In the event, however, that the Court does not so agree it is submitted that the induction order of the local board was not proved by the Government to be "a valid induction order as a basis for appellant's conviction," as stated by this Court in *Franks v. United States*, 216 F. 2d 266, at page 270 (1954). As there stated, "the conviction notwithstanding this disregard of the Regulations constitutes a plain error within the meaning of Rule 52(b) of the Rules of Criminal Procedure, 18 U.S.C.A." (216 F. 2d at page 270) It is submitted that the error of the court below in failing to hold that the draft board order was void because the classification was contrary to law so seriously affects the substantial rights of the appellant that the judgment must be reversed.

It may also be argued by the Government that because the appellant did not file a formal claim for the IV-F classification or an appeal statement claiming the IV-F classification but, on the contrary, at all times insisted that he should be classified as a minister constitutes a waiver of his right to challenge the appeal board classification for a failure to give him the IV-F classification. In the event such argument is advanced it will be contrary to the holding of this Court in *Cox v. Wedemeyer*, 192 F. 2d 920 (9th Cir. 1951). In that case this Court, *inter alia*, said: "We think that the meaning of these regulations was that the board of appeal was required to classify the registrant de novo on the basis of his whole Selective Service Record." See also *Franks v. United States*, 216 F. 2d 266 at pages 269-270 (9th Cir. 1954); *Pine v. United States*, 212 F. 2d 93 at page 98 (4th Cir. 1954); *United States v. Pitt*, 144 F. 2d 169, 172 (3rd Cir. 1944).

Section 1626.26 (a) of the Regulations (32 C.F.R. § 1626.26 (a)) provides that the appeal board shall classify

the registrant “in the same manner in which a local board gives consideration thereto when it classifies a registrant.” Section 1626.26 (a) provides that the registrant shall not be placed in Class IV-F because of physical or mental disability unless the local board has so classified the registrant. This limitation does not extend to persons convicted of a felony and it does not prevent the appeal board from classifying a felon in Class IV-F, as required by the Act (50 U. S. C. A. App. § 456 (m)) and Section 1622.44 of the Regulations. Section 1626.26 (a) is restricted to physical and mental disability and does not extend to moral disqualifications or convictions of felonies. In the event such Regulation (32 C. F. R. § 1626.26 (a)) is construed so as to reach persons convicted of a felony then the appellant says that such Regulation is void because it is in conflict with the Act (50 U. S. C. A. App. § 456 (m)) for the reasons above stated.

United States v. Bouziden, 108 F. Supp. 395 (W. D. Okla. 1952), must be considered as dictum because the defendant in that case was acquitted on other grounds and no appeal could be taken from the ruling. The holding also is error, contrary to law and based upon the proposition that the congressional disqualification “is a discretionary power usable by the United States Government or the Selective Service System.” (108 F. Supp. at page 397) There is no such implication in the Act (50 U. S. C. A. App. § 456 (m)). Such interpretation is without any support whatever and is contrary to the express language of the Act.

While deferments are granted at the discretion of Congress, when the facts of a case show that the congressional mandate is applicable the Act of Congress cannot be rejected on the grounds that the action of the board is discretionary.—*Ver Mehren v. Sirmyer*, 36 F. 2d 876 (8th Cir. 1929) at pages 881-882; *Simmons v. United States*, 348 U. S. 397 at pages 405-406 (1955); *Sicurella v. United States*, 348 U. S. 385 at page 392 (1955); *Gonzales v. United States*, 348 U. S. 407, 416-417 (1955); *Shepherd v. United States*,

217 F. 2d 942, 946 (9th Cir. 1954) ; *Johnson v. United States*, 126 F. 2d 242, 247 (8th Cir. 1942).

The undisputed evidence in this case shows that the appellant had been convicted of a felony. This showing brought him squarely within the provisions of the Act (50 U. S. C. A. App. § 456 (m)) and Section 1622.44 of the Regulations, when reasonably construed consistent with the Act. The I-O classification is contrary to law and without basis in fact. It is arbitrary and capricious, making the final order to report for civilian work void. The district court should have sustained the motion for judgment of acquittal based on these contentions. The failure of the court below to do so, it is submitted, constitutes reversible error.

TWO

The appeal board arbitrarily and capriciously failed to follow the classification procedure commanded by Section 1623.2 by failing to come up from the bottom of the list of classifications from I-C up to IV-F but went down the list of classifications from I-A-O to I-O and ignored the IV-F classification, making the final order to do civilian work void.

Section 1623.2 of the Regulations (32 C. F. R. § 1623.2) places the I-A-O classification at the top of the list and it is stated to be “the highest class” and Class I-C is considered “the lowest class.” IV-F is the fourth class from the bottom of the list. The Regulation (32 C. F. R. § 1623.2) says that “when grounds are established” the registrant shall be “classified in the lowest class for which he is determined to be eligible.” The appeal board did not follow this classification procedure. It received the recommendation of the Department of Justice to place the registrant in Class I-O.

The reference of the case to the Department of Justice constituted a determination by the appeal board to ascertain if there was “new *support* for the registrant’s claim.” (*White v. United States*, 215 F. 2d 782 at page 790 (9th Cir.

1954). The recommendation of the Department of Justice was that the appellant be classified I-O. (F. 56-80) The appeal board sent this recommendation to appellant. (F. 55) After considering his answer, stating that he wanted to appeal the I-O, the appeal board classified him in that classification. (F. 4, 53-54) Theretofore on May 11, 1955, the appeal board forwarded the case to the Department of Justice for determination as to whether appellant was entitled to the conscientious objector classification. (F. 122)

The record references of the proceedings in the appeal board show that the appeal board at no time followed the classification procedure of going up from the bottom of the list, instead of coming down from the top of the list as commanded by Section 1623.2 of the Regulations (32 C. F. R. § 1623.2).

The violation of this procedural requirement constitutes a denial of procedural due process of law. *Ver Mehren v. Sirmyer*, 36 F. 2d 876 (8th Cir. 1929) at pages 881-882; *Simmons v. United States*, 348 U. S. 397, at pages 405-406 (1955); *Sicurella v. United States*, 348 U. S. 385 at page 392 (1955); *Gonzales v. United States*, 348 U. S. 407, 416-417 (1955); *Johnson v. United States*, 126 F. 2d 242, 247 (8th Cir. 1942). The burden is upon the Government to show that the violation of this procedural Regulation (32 C. F. R. § 1623.2) was harmless error. Since there is an absence of affirmative proof that the appellant was not prejudiced by the failure of the appeal board to follow the Regulation. It must be concluded that the appellant was harmed.—*Steele v. United States*, 240 F. 2d 142, at pages 145-146 (1st Cir. 1956); compare *Franks v. United States*, 216 F. 2d 266, 269-270 (9th Cir. 1954).

The record shows without dispute that the appeal board proceeded to consider appellant's case primarily on one question, which was whether or not he was a conscientious objector. It is true that the record does not disclose expressly that the appeal board admitted that it did not follow Section 1623.2 of the Regulations but the record also does

not show that the appeal board did follow the Regulation. Under *Steele v. United States*, 240 F. 2d 142, 145-146 (1st Cir. 1956), the failure of the Government to prove that the appeal board did follow the Regulation prevents any speculation by this Court that the appeal board did follow the Regulation. It is true that there is a presumption of regularity of administrative proceedings but this presumption does not apply in criminal proceedings because of the presumption of innocence. Notwithstanding *Koch v. United States*, 150 F. 2d 762, 763 (4th Cir. 1945), and *United States v. Fratricks*, 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, appellant says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

In *Jones on Evidence in Civil Cases*, Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop v. United States*, 165 U.S. 486 (1897), and *Edwards v. United States*, 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions. It is submitted, therefore, that it cannot be said that the appeal board is presumed to have followed the Regulation.

It is submitted therefore that this Court should hold that the appeal board failed to follow the procedural requirements of Section 1623.2 of the Regulations (32 C.F.R. § 1623.2) and by reason thereof the appellant was harmed to such an extent as to require reversal of the judgment of conviction in this case. The failure of the trial court to sustain the motion for judgment of acquittal for this reason constituted reversible error.

CONCLUSION

The judgment of the court below should be reversed because the trial court committed reversible error in denying the motion for judgment of acquittal because (a) there was no basis in fact for the denial of the IV-F classification and the final classification was contrary to law, making it arbitrary and capricious, and (b) the appeal board did not follow the procedural requirements of Section 1623.2 of the Regulations (32 C. F. R. § 1623.2) as to procedure to be followed upon classification; either or both of which make void the order of the local board supporting the conviction, requiring a reversal of the judgment of the court below.

WHEREFORE, the appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to the trial court to enter a judgment of acquittal and discharge the appellant, or in the alternative order a new trial.

Respectfully submitted,

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Counsel for Appellant

January, 1958.

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No. 15,673

IN THE

United States Court of Appeals

For the Ninth Circuit

| | |
|---------------------------|-------------------|
| ROBERT LEE KORTE, | } |
| VS. | |
| UNITED STATES OF AMERICA, | |
| | <i>Appellant,</i> |
| | <i>Appellee.</i> |

BRIEF FOR APPELLEE.

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United States Attorney,
DONALD B. CONSTINE,
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FILED

APR 10 1958

PAUL P. O'FARRELL, CLERK

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No. 15,673

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ROBERT LEE KORTE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 32-31, Title 50 United States Code, Section 462, and Rule 37(a)(1) and (3) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on March 27, 1957 for failing to comply with the order of his Local Board to report to his Local Board for instructions to proceed to a place of employment for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided for in the Universal Military Training and Service Act of

1948, as amended, in violation of the Universal Military Training and Service Act of 1948, as amended. (TR 4.) On June 3, 1957, after waiving trial by jury, appellant was tried by the Court, The Honorable Michael J. Roche presiding. (TR 9.) On June 4, 1957 appellant was found guilty as charged. (TR 60.) On June 17, 1957, appellant was sentenced to nine months imprisonment. (TR 6, 7.) Notice of appeal was timely made to this Court. (TR 7, 8.)

Appellant was originally classified Class 1-A. (Exhibit 1.) After being ordered for induction into the Armed Forces of the United States, appellant refused to submit for induction and was tried and convicted of a violation of the Universal Military Training and Service Act, on July 13, 1953. (Exhibit 1.) Appellant was sentenced to eighteen months imprisonment. (Exhibit 1.) Appellant was released from the penitentiary on March 24, 1954, on parole. (Exhibit 1.) His parole apparently expired on February 2, 1955. (Exhibit 1.) On January 25, 1955 the appellant's Local Board secured information from the defendant indicating the violation and sentence above described. (Exhibit 1.) On February 4, 1955, appellant was classified 1-A. (Exhibit 1.) On April 18, 1955 appellant appealed his classification of 1-A. (Exhibit 1.) His case was then referred to the Department of Justice for a hearing. (Exhibit 1.)

On August 30, 1955 appellant was ordered to report on Sept. 9, 1955 for an Armed Forces physical examination and directed to report to the Army Induction Station at 30 Van Ness Avenue in San Francisco,

California. (Exhibit 1.) He received such an examination on that date. (Exhibit 1.) On November 21, 1955 the United States Army Induction Station requested the Adjutant General to determine appellant's eligibility for induction in view of his criminal record. A moral waiver for induction was approved by the Adjutant General on 8 December 1955 after the joint induction screening group for the Army, Navy, Air Force and Marine Corp approved such a waiver. On December 14, 1955 the Induction Station Commander executed a certificate of acceptability certifying that as of that date appellant was found fully acceptable for induction into the Armed Forces.

On February 29, 1956 the Department of Justice recommended that appellant's claim of conscientious objection be sustained. The Appeal Board then on July 26, 1956 classified appellant 1-O. (Exhibit 1.)

On August 1, 1956, appellant refused to volunteer for civilian work in lieu of induction. (Exhibit 1.)

On October 18, 1956 appellant was interviewed by the Local Board but refused to accept any civilian work that was offered. The Local Board determined on that date that work was available as an institutional helper for the County of Los Angeles, Department of Charities. On November 14, 1956 appellant was ordered to report to his Local Board on November 26, 1956 for instructions to proceed to a place of employment. It was stipulated at the trial that the defendant knowingly failed to report to his Local Board as ordered on November 26, 1956 to receive instructions to report for work. (TR 10.)

At the trial the Selective Service file was admitted in evidence as United States Exhibit 1.

QUESTIONS PRESENTED.

1. Does conviction of a felony grant permanent deferment from obligation under the Universal Military Training and Service Act?

2. In the absence of any statement by the Appeal Board, must it be presumed that the Board failed to follow Selective Service Regulations?

ARGUMENT.

I. CONVICTION OF A FELONY DOES NOT GRANT PERMANENT IMMUNITY FROM SERVICE.

Appellant argues that since he had previously been convicted of a violation of the Universal Military Training and Service Act that he was entitled, as a matter of law, to a 4-F classification. In his words, "Section 6(m) of the Act, in the proviso clause thereof, releases from training and service any person who has been convicted of a felony." (Page 8 Appellant's Brief.) Section 6(m) of the Universal Military Training and Service Act provides

"no person shall be relieved from training and service under this Title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year."

This statute is not a direction on the part of Congress to exempt from "training and service" those persons convicted of felonies, but on the contrary is an injunction not to defer from training and service those persons who have been convicted of misdemeanors. The statute makes a deferment permissible when there has been a conviction of a felony, but does not require that exemption be granted.

Two cases have considered the argument that a prior conviction of a felony relieves a registrant from his Selective Service liability. These cases are *U. S. v. Doty*, 218 F.2d 93 (8th Cir. 1955), and *U. S. v. Bouziden*, W. D. Okla. 108 F. Supp. 395. In the *Doty* case the Court stated as follows,

"Persons convicted of an offense which may be punishable by death or by imprisonment for a term exceeding one year are not made ineligible for service under the act. They may be rejected by the Draft Board or by the Military authorities at the time they reported for induction, but their acceptance or rejection rests in the discretion of the Draft Board or the Military authorities. The statute grants such persons no immunity from their obligations under the Act."

A 4-F classification granted because a registrant has been convicted of a crime is not given for the benefit of the registrant. It is given for the benefit of the Armed Forces. In other words, a conviction of a felony does not create in a registrant any special right to consideration. By his conviction he has not merited the consideration shown by Congress to World War

II veterans for example. The reason for the 4-F classification is simply that the agencies entrusted with selecting personnel to defend the United States feel that it would not be to the interest of the Services to have some convicted felons in their ranks.

Conviction of a felony is simply a moral disqualification from service in the Armed Forces. It is a disqualification because some felons might contaminate other Service personnel or steal from the Government.

It is common knowledge that during some periods specific physical defects disqualify individuals from service and in some periods they do not. The needs of the United States for manpower in the Armed Forces varies from time to time. Many countries at war have come to the point of drafting amputees. The physical defects that might disqualify an individual during periods of peace and relative calm may be disregarded when the Nation is in danger. Moral disqualification standards also must vary. In reaching their decisions Selective Service Boards are selecting the Nation's military personnel from the Nation's citizenry and must act for the benefit of the National welfare and not primarily from the viewpoint of an individual's interest or preference. *Local Draft Board No. 1 v. Connors*, 9th Cir., 124 F.2d 388. No classification is permanent. Selective Service Regulation 1625.1. The Selective Service Boards must provide men for service under the shifting standards which the needs of the Services require.

The Universal Military Training and Service Act provides in Section 4a that,

“No persons shall be inducted into the Armed Forces for training and service or shall be inducted for training in the National Security Training Corps under this Title until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense.”

Pursuant to this legislative mandate there have been set up induction stations which “Determined by examination, registrants meet the physical, mental and moral standards for service in the Armed Forces.” Department of the Army, Special Regulations approved 10 April 1953, SR615-180-1.¹ Prior to an order to report for induction a registrant receives an Armed Forces physical examination. Selective Service Regulation 1268.10. At this physical examination information is secured with respect to a registrant’s moral standards. Under Department of the Army Special Regulation, approved 10 April 1953, SR615-180-1, Par. 10d, information concerning court convictions of a registrant is secured and placed on DD-Form 47. The full circumstances of the conviction are obtained from the registrant during a pre-induction interview which is provided by Par. 10 of the above cited regulation.

The Department of Defense Regulations provide that one who has been convicted of a felony is morally unacceptable for service in the Armed Forces unless

¹The Army regulations cited in this brief are the regulations which were applicable on December 14, 1955, which was the date appellant was found acceptable for service.

this disqualification is waived. SR615-180-1, Par. 10.d. (1). If a waiver is granted, however, then a registrant is acceptable to the Department of Defense. The regulations of Selective Service provide for the waiver situation in Section 1622.44(c), by providing for a 4-F classification for those convicted of felonies except for those who are "eligible for classification into a class available for service." When the moral disability is waived by the Department of Defense then a registrant is eligible for classification into a class available for service.

In the instant case the file reflects that appellant received a waiver from the Defense Department for his moral defect. There is no question in the instant case but that the regulations were followed and there is no procedural defect in the waiver procedures except the claim on the part of appellant that the statute forbids his induction.

It is apparently appellant's desire that he be immune from service to his Country, either in the Armed Forces or for civilian work contributing to the National welfare. Other individuals, however, who have been convicted of felonies may have completely rehabilitated themselves and may possibly desire to expiate their debt to society by contributing to their Country's defense. The rule contended for by appellant would deprive these individuals of their chance to take their place as completely rehabilitated members of a society in which service in the Armed Forces is the usual duty of a good citizen. This we submit as neither desirable nor does it appear to be the intent of Congress.

Some insight into the intent of Congress with respect to 6(m) of the Act can be gained by examination of the predecessor statute. The Act of November 13, 1942, 56 Stat. 1018, reads in part as follows: "No individual who has been convicted of any crime which may not be punishable by death or by imprisonment for a term exceeding a year shall by reason solely of such conviction be relieved from liability for training and service under this act." As can be seen from House Report 2574, 77th Congress, Second Session, the purpose of this amendment was to permit the utilization of those persons convicted of crime as a source of manpower in the discretion of the Selective Service authorities. In the debates, Mr. May, of the Committee on Military Affairs, stated as follows:

"The committee wrote into the bill another section by way of amendment. I am sure every Member present knows of the practice and the rule in the War Department for some time that they would not induct into the service a man who had been convicted of a felony. That practice had gone even to the extent of not inducting men who had been convicted of misdemeanors; for instance, a man might be convicted under some provision of the national prohibition law, might be convicted of a breach of the peace, but such court conviction barred him from admission to the service. We have provided that no individual shall be relieved from liability for training and service under this act or held to be not acceptable to the land or naval forces for such training and service on the grounds of his having been convicted of any crime which is not a felony at common law if the local

board determines that such individual notwithstanding such conviction is morally fit for service.”

In response to a question as to whether it was the intent of the bill to give those persons a chance to fight if qualified, Congressman May stated as follows:

“That is the intent of the committee and I may say that I have been of the opinion that sometimes a fellow who has maybe shot and wounded a man under the heat of passion or in sudden affray, and although convicted, would make a good soldier.” (Congressional Record, October 17, 1942, p. 8275.)

It can be seen from the debates and House Report that Congress considered the possibility that an individual might have at one time in his life been convicted of a felony and yet had so rehabilitated himself as to become a valuable addition to the Nation's military forces. In addition Congress might have in mind not putting a premium on exemption for military service on the conviction of crime.

It would be a strange condition indeed if an individual who committed a crime which under the law is a felony could create for himself a complete immunity from service. Such a result cannot have been in the Congress' mind. The statute was enacted for the purpose of furnishing a guide to the Selective Service and Defense Department authorities in determining what persons should be exempted from service. It was obviously Congress' intent to direct that those persons convicted of misdemeanors should

not by that reason alone be ineligible for service. Nowhere does it appear that their intent was to utterly disqualify and grant immunity to men convicted of felonies who, nevertheless, in the judgment of the Defense Department might be morally acceptable. The Department of the Army and the Selective Service System by the implementing regulations above cited have provided for a proper and lawful exercise of the discretion granted under the Act to select individuals for service.

**II. THERE IS NO PRESUMPTION THAT THE APPEAL BOARD
ACTED CONTRARY TO THE REGULATIONS.**

The second part of appellant's argument advances the proposition that the Appeal Board in this case failed to follow Section 1623.2 of the Regulations. It is claimed that the Appeal Board did not consider the various classifications under which appellant might have been classified from the lowest classification on up to the 1-O classification which he actually received. No particular reason is advanced for this conclusion except that he did not receive a 4-F classification which is the classification appellant argues he should have received.

Appellant argues he is presumed to be innocent; the Appeal Board did not expressly state that it did not use an improper classification method so, therefore, it must be presumed they used an improper method of classification. See p. 14 Appellant's Brief where he states, "It is true that the record does not disclose

expressly that the Appeal Board admitted that it did not follow Section 1623.2 of the Regulations but the record also does not show that the Appeal Board did follow the Regulation. Under *Steele v. United States*, 240 F.2d 142, 145-146 (1st Cir. 1956), the failure of the Government to prove that the appeal board did follow the Regulation prevents any speculation by this Court that the appeal board did follow the Regulation. It is true that there is a presumption of regularity of administrative proceedings but this presumption does not apply in criminal proceedings because of the presumption of innocence.”

We submit that this argument is the most errant nonsense. The Selective Service regulations nowhere require that the Appeal Board include as a part of the record its deliberations, nor do the regulations require that the Appeal Board set forth the reasons for their classifications, nor does the Universal Military Training and Service Act require that they do so. The formal procedures required in a Court of Law are not required of an administrative body such as the Selective Service System. *U. S. v. Nugent*, 346 U. S. 1.

It simply does not follow that when the Appeal Board failed to state the reasons for his classification that a Court must conclude that it classified for the wrong reasons and in the wrong manner. The presumption of innocence obviously has nothing to do with the case. The uniform holdings of all the Courts have been that if there is a basis in fact for a classification the determinations of the Appeal Board must be upheld. *Witmer v. U. S.*, 348 U.S. 375, 380-381.

Appellant does not argue that there was not basis in fact for the Appeal Board to classify him 1-O. He simply states that the Court must assume because the Appeal Board did not state that it did follow its regulations, that it did not.

What appellant is actually submitting to the Court is the proposition that the deliberations of the Appeal Board must be presumed to be irregular. Simply stated, he is attempting to create a new and novel presumption, i.e., the presumption of administrative irregularity from silence. We suggest that if it is desirable that the Appeal Board state the reasons for its rulings and the manner in which they arrived at them, the proper body to enact this requirement into law is the Congress.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
April 1, 1958.

LLOYD H. BURKE,

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DONALD B. CONSTINE,

Assistant United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTES AND REGULATIONS.

Section 6(m) of The Universal Military Training and Service Act of 1948, as amended (50 App. 456m) Moral Standards.

“No person shall be relieved from training and service under this title by reason of conviction of a criminal offense, except where the offense of which he has been convicted may be punished by death, or by imprisonment for a term exceeding one year.”

Selective Service Regulation 1622.44 Class IV-F: Physically, Mentally, or Morally Unfit.

“In Class IV-F shall be placed any registrant (a) who is found to be physically or mentally unfit for any service in the armed forces; (b) who, under the procedures and standards prescribed by the Secretary of Defense, is found to be morally unacceptable for any service in the armed forces; (c) who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who is not eligible for classification into a class available for service; or (d) who has been separated from the armed forces by discharge other than an honorable discharge or a discharge under honorable conditions, or an equivalent type of release from service, and for whom the local board has not received a statement from the armed forces that the registrant is morally acceptable notwithstanding such discharge or separation.”

Selective Service Regulation 1628.10 Who Will Be Examined.

“Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination.”

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 3. Functions of Induction Stations.

“The primary functions of induction stations are to—

a. Determine by examination which registrants meet the physical, mental, and moral standards for service in the Armed Forces.”

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d. Moral Standards (except as provided in par. 27e.).

“Information concerning court convictions of a registrant and whether he is in custody of the law will be indicated on DD Form 47, under item 14a and b. More specific information concerning such an entry, especially with respect to personal background, the circumstances of the incident or incidents, and final disposition of charges will be obtained from the registrant at the induction station during the preinduction interview. If a

waiver is granted under (1) or (2) below, a copy of the report of investigation on which waiver is predicated will be attached to the original copy of the induction record (DD Form 47).”

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10d(1).

“A registrant who has been convicted by a civil court, or who has a record of adjudication adverse to him by a juvenile court, for any offense punishable by death or imprisonment for a term exceeding 1 year is morally unacceptable for service in the Armed Forces unless such disqualification is waived by the respective department . . .”.

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 10e. Individuals ineligible for induction.

“Individuals listed below are ineligible for induction.”

Administrative Disqualifications

(1)(c) “Registrants who fail to meet the prescribed moral standards indicated in d. above.”

Department of the Army Special Regulations, approved 10 April 1953, SR615-180-1. Par. 14. Preparation and processing of records.

“ . . .

b. DD Form 47. (1) Purpose.—DD Form 47 is the official form for recording the results of the administrative records examination during the registrant’s preinduction and induction processing. It is a basic personnel document in the files of the Armed Forces and Selective Service System.”

No. 15677 ✓

United States
Court of Appeals
for the Ninth Circuit

FRANK REINER,

Appellant,

vs.

NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

FEB 18 1958

PAUL P. O'BRIEN, CLERK

No. 15677

United States
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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellant.

KOERNER, YOUNG, McCOLLOCH AND
DEZENDORF;
JOHN GORDON GEARIN,
JOSEPH LARKIN,
800 Pacific Building,
Portland 4, Oregon,
For Appellee.

state transportation and commerce, and that plaintiff was employed by defendant as its servant and employee, and as such, was working and engaged in interstate transportation and commerce at the time of receiving his injuries, and was working in the furtherance of interstate commerce and in work which directly, closely and substantially affected the general interstate commerce carried on by said defendant as a railway common carrier of passengers and freight for hire.

IV.

That on or about the 6th day of February, 1955, plaintiff was in the employ of the defendant as a Pilot Herder, and was engaging in the course and scope of his employment for the defendant in piloting a two-unit diesel locomotive which was owned by the Southern Pacific Railroad Company, and which locomotive was being operated, managed and controlled by the defendant, Northern Pacific Terminal Company of Oregon, its agents, servants and employees; that during the course of plaintiff's work, said diesel was moved from the passenger station at Portland, Oregon, to the Lake Yard where it was serviced and turned around, whereupon it proceeded to the vicinity of 17th Street in said city where it was brought to a stop on the inbound main line at which time plaintiff was engaged in the cab of the trailing unit of said locomotive and while he was so engaging the defendant, its agents, servants and employees negligently, carelessly and without notice or warning to plaintiff suddenly

started and backed said locomotive and propelled it at a high rate of speed in reverse movement on said inbound main line track and thereby caused it to violently collide with a cut of cars which were in the process of being switched from the adjacent outbound main line track and through a cross-over and onto said inbound main line track and causing said cars to be derailed and collide with an electric power line pole carrying high voltage wires and thereby plaintiff was placed in imminent peril to his life and limb and to avoid such peril plaintiff jumped from said locomotive to the ground thereby sustaining serious and permanent injuries as herein-after set forth.

V.

Plaintiff further alleges that the aforesaid occurrence and the resulting injuries to plaintiff were directly and proximately caused or contributed to by the negligence of the defendant, its agents, servants and employees other than the plaintiff as hereinbefore alleged and in one or more of the following additional particulars:

(a) That the defendant negligently operated and propelled said locomotive in reverse movement on said track at a high and dangerous rate of speed contrary to and in violation of the rules, customs and practices then and there in force and effect.

(b) That the defendant negligently moved and operated said locomotive in reverse move-

ment without timely or adequate warning to plaintiff of its intentions so to do.

(c) That the defendant negligently moved said locomotive at a high, dangerous and excessive rate of speed, without having it under control and without keeping a proper lookout and with disregard for the safety of plaintiff.

(d) That the defendant negligently moved said locomotive on said track in violation of the rules, customs and practices then and there in force and effect.

(e) That the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place to work.

(f) That the defendant negligently failed to adopt and enforce a reasonably safe plan and method of performing said work.

VI.

That by reason of defendant's negligence as hereinbefore alleged, plaintiff was severely and permanently injured about his entire body; that among the injuries he received the bones, vertebrae, intervertebral discs, muscles, tissues, nerves and ligaments of his back and spine were injured and on or about October 4, 1955, was required to submit to surgery in an attempt to alleviate said injuries; his left hip and left knee were injured; he suffered a post-traumatic pulmonary embolus; his chest and in-

ternal organs were injured and shocked and he was made sick, sore, lame and permanently disabled.

VII.

That in an effort to relieve and heal himself of said injuries plaintiff has been compelled to expend a considerable sum of money for medical, hospital, nursing care, etc., and in the future will be compelled to spend a considerable sum of money for said purposes, the exact amount of which cannot be definitely determined at this time.

VIII.

That by reason of the facts hereinbefore alleged, plaintiff has suffered and sustained at the hands of defendant damages in the sum of Eighty-Five Thousand Dollars (\$85,000.00).

Wherefore, plaintiff demands judgment against the defendant for the sum of Eighty-Five Thousand Dollars (\$85,000.00), together with his costs and disbursements herein.

/s/ OWEN A. JOHNSON,
Attorney for Plaintiff.

Duly Verified.

[Endorsed]: Filed October 31, 1956.

[Title of District Court and Cause.]

ANSWER

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant denies each and every, all and singular, generally and specifically, the allegations contained in plaintiff's complaint and each and every part thereof and the whole thereof, and specifically denies that it was guilty of negligence in any particular as charged or at all or that any act or omission on its part whether alleged or not constituted a proximate or other cause of the accident described in the complaint herein, and specifically denies that plaintiff has been generally damaged in the sum of \$85,000.00, or in any other sum or sums whatsoever, or at all, except defendant admits:

I.

Defendant is an Oregon corporation engaged as a common carrier.

II.

On or about the 6th day of February, 1955, plaintiff was employed by defendant as a Pilot Herder and on said date received an injury.

Third Defense

Plaintiff was guilty of negligence constituting the sole, proximate, contributing and concurring cause of his injury.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff take nothing thereby.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed November 7, 1956.

[Title of District Court and Cause.]

SUPPLEMENT TO COMPLAINT

Comes now plaintiff, and permission of the Court having been obtained, amends Paragraph IV of his complaint by striking lines 22 through 25 on page 2 of said complaint and substituting for said struck portion the following:

“And thereby plaintiff was caused to be thrown violently against the parts of the cab of said locomotive and injured, and because of said derailment and collision he was placed in imminent peril of his life and limb and to avoid such peril, plaintiff jumped from said locomotive to the ground, thereby

sustaining further injuries, all of which injuries are of a serious, painful and permanent nature.”

BAILEY, LEZAK, SWINK &
GATES;

By /s/ SIDNEY I. LEZAK,
Of Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

MINUTE ORDER RE MOTION TO
STRIKE, ETC.
(January 21, 1957)

Motion to strike portion of oral testimony of Frank Reiner regarding pension and discipline for wreck and request for instruction to jury to that effect by plaintiff.

Order denying above motion.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find in favor of the defendant, Northern Pacific Terminal Company of Oregon.

Portland, Oregon, January 23, 1957.

/s/ HOLT W. BERNI,
Foreman of the Jury.

[Endorsed]: Filed January 23, 1957.

[Title of District Court and Cause.]

MINUTE ORDERS RE ENTRIES OF
VERDICT AND JUDGMENT
(January 23, 1957)

Order that Court's instructions go to the jury.

Order to enter verdict as returned for defendant.

Order to enter judgment on the verdict for defendant with costs.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff and moves this Court for an order setting aside the verdict of the jury and the judgment heretofore entered in the above-entitled cause and awarding the plaintiff a new trial for the the following reasons:

1. The Court erred in refusing to instruct the jury as requested that the cause of the collision of February 6, 1955, was the negligence of the defendant in one or more of the particulars charged by the plaintiff.

2. The Court erred in refusing to instruct the jury as requested by plaintiff that medical witnesses were available equally to either party and that no adverse inference could be drawn from the failure of either party to call a medical witness.

3. The Court erred in failing to sustain plaintiff's objection to the question put by defendant's counsel to plaintiff as to whether or not plaintiff was drawing a pension from defendant company.

4. The Court erred in refusing to instruct the jury as requested by plaintiff that the receipt by plaintiff of a pension was immaterial to any issue in the cause.

5. The Court erred in permitting the defendant's counsel, both at the time of interrogation of the jurors and in argument, after objection, to comment on attorneys who were not actually participating in the trial of the cause before the jury.

6. The verdict of the jury was against the clear weight of the evidence.

7. The question asked by defendant's counsel of plaintiff as to whether plaintiff had been disciplined by defendant as a result of his part in the accident constituted misconduct on the part of counsel for defendant, which could not be cured by sustaining the objection to the question.

BAILEY, LEZAK, SWINK &
GATES;

By /s/ SIDNEY I. LEZAK,

Of Attorneys for Plaintiff.

In presenting argument on the above motion, plaintiff will rely on Chapter 45 U.S.C.A. §§51-60, Rule 59 of the Federal Rules of Civil Procedure and cases cited thereunder. The above motion is, in the opinion of the undersigned, well founded at law and not made for purposes of delay.

/s/ SIDNEY I. LEZAK,
Of Counsel for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 30, 1957.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S MOTION
FOR A NEW TRIAL

This cause having come before the Court for hearing on plaintiff's motion for a new trial, and the motion having been submitted for decision;

It Is Now Ordered that plaintiff's motion for a new trial is hereby denied.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.

June 21, 1957.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed June 24, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Frank Reiner, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment on the verdict for defendant with costs entered in this action on January 23, 1957.

/s/ OWEN A. JOHNSON,

/s/ EUGENE RERAT,

Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

No. 8874 (Civil)

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Frank Reiner, the plaintiff above named, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as Surety, are held and firmly bound unto the Northern Pacific Terminal Company of Oregon in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, for which sum well and truly to be paid, the undersigned Principal and Surety bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas, Frank Reiner, named above as Principal, has appealed or is about to appeal to the United States Court of Appeals for the Ninth Circuit from the judgment for the Defendant, above named, entered on January 23, 1957, in the above-entitled action, and

Whereas, as a condition to such appeal the Principal above named, Frank Reiner, is obligated to furnish this bond for the payment of costs in the sum of \$250.00.

Now, Therefore, if Frank Reiner shall well and truly pay all costs that may be awarded against him on the appeal or on the dismissal thereof, not exceeding the penalty of this bond in the aggregate, then this bond shall be void; otherwise to remain in full force and effect.

Signed, sealed, and dated this 3rd day of July, 1957.

/s/ FRANK REINER,
Principal.

[Seal] AMERICAN BONDING COM-
PANY OF BALTIMORE,

By /s/ ROBERT B. CUMMING,
Attorney-in-Fact and
Resident Agent.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT OF POINTS

Plaintiff herewith presents the Statement of Points upon appeal:

1. The Court erred in denying plaintiff's motion for a new trial.

2. The defendant railroad company was negligent as a matter of law for reason that the train movement was in violation of governing working rules and, further, that any contributory negligence that may have been attributed to plaintiff would only be in mitigation of damages rather than a complete and total defense.

3. The repeated questioning on behalf of defendant's attorney concerning an alleged but never established pension and plaintiff's retirement, which questioning was within the hearing of the jury, and, in addition, defendant's attorney's closing argument pertaining to said alleged pension and plaintiff's retirement were so prejudicial and inflammatory so as to deprive plaintiff of a fair trial.

4. The Court erred in failing to sustain plaintiff's objection to the questions put by defendant's counsel to plaintiff as to whether or not plaintiff was drawing a pension from defendant company.

5. The Court erred in refusing to instruct the jury as requested by plaintiff that the receipt by plaintiff of a pension and retirement was immaterial to any issue in the case, and the Court

further erred by submitting the issue of the company pension and plaintiff's retirement to the jury.

6. The repeated references and questioning on behalf of defendant's attorney regarding discipline of the plaintiff on behalf of defendant company and by repeated references and questioning pertaining to company's disciplinary proceedings constituted misconduct on the part of the attorney for the defendant, which resulted in such prejudice to the plaintiff which could not be cured by sustaining objections to said questions and as a result of which plaintiff was deprived of a fair trial.

7. The job classifications "pilot" and "pilot herder" and the responsibilities and duties attributable to each classification were used indiscriminately throughout the trial in such a manner so as to cause confusion as to what responsibilities should be attributed to the plaintiff in this action and so as to attribute a greater standard of responsibility to the plaintiff than was required of him in view of his employment as a "pilot herder" or "switchman." There is no evidence in the record that plaintiff was employed as a "pilot," as defined in the company rules.

8. The verdict of the jury was against the clear weight of the evidence.

9. The Court erred in permitting the attorney for the defendant, both at the time of interrogation of the jurors and in his closing argument, after objection on behalf of the plaintiff, to comment on the

attorneys who were not actually participating in the trial in the cause before the jury in such a manner so as to inflame the jury against the plaintiff with such resulting prejudice to the plaintiff that the plaintiff was deprived of a fair trial.

/s/ OWEN A. JOHNSON,

/s/ EUGENE R. RERAT,

Attorneys for Plaintiff, Frank
Reiner.

[Endorsed]: Filed July 16, 1957.

[Title of District Court and Cause.]

ORDER OF TRANSMITTAL OF ORIGINAL EXHIBITS

This Matter having come on for hearing upon motion of the plaintiff for the transmittal to the United States Court of Appeals for the Ninth Circuit of exhibits in the above-entitled cause, and it appearing that a proper consideration of the issues raised on appeal requires the inspection of these exhibits in their original form, Now, Therefore,

It Is Ordered that the Clerk of this Court shall transmit to the United States Court of Appeals for the Ninth Circuit Exhibits 1, 2, 3, 4, 5, 13 and 21, to be safely kept by the Clerk of the Court of Appeals for the use of that Court in consideration of

this cause, and thereafter to be returned by him to this Court.

Done in Open Court this 25th day of July, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed July 25, 1957.

United States District Court,
District of Oregon
Civil No. 8874

FRANK REINER,

Plaintiff,

vs.

NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON,

Defendant.

Monday, January 21, 1957

Before: Honorable William C. Mathes, District
Judge, with a jury.

Appearances:

EUGENE RERAT,
OWEN A. JOHNSON, and
SIDNEY I. LEZAK,
Attorneys for Plaintiff.

JOHN GORDON GEARIN,
Of Attorneys for Defendant.

PARTIAL TRANSCRIPT OF PROCEEDINGS
(Opening Statements by Counsel)

(The jury having been duly empaneled and sworn and one alternate also having been duly sworn, the following proceedings were had:)

The Court: Ladies and Gentlemen, before proceeding with the case, I will excuse you for a brief recess while I take up some other matters, but before we separate I must admonish you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of the trial. You are not to form or express an opinion on the case until after it is finally submitted for your verdict. You are now excused for a five-minute recess.

(Jury retires for recess.)

(Trial resumed with jury in the box.)

The Court: In the case 8874 is it stipulated, Gentlemen, the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes.

We have some of the exhibits in the courtroom now, and probably Mr. Gearin would like an opportunity of looking at them. They are aerial views, two aerial views. There are also the pictures that we discussed before, your Honor, as to the damage that was done to the various parts of the cars involved in this accident. [*2]

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: Is there any objection on the part of defendant?

Mr. Gearin: I have not seen any picture of the wreck, your Honor. On Counsel's representation that this is the one, I guess that is it.

Mr. Rerat: Yes; there will be two witnesses here to identify that.

Mr. Gearin: Fine.

Mr. Rerat: These are the pictures of the place where the accident happened.

The Court: Have they been marked?

Mr. Rerat: They have not been marked as yet, your Honor.

The Court: Unless you identify them in the record, this record won't be very intelligible.

Mr. Rerat: I thought, your Honor, at the time that they would be offered, or do you identify them before? May I step up and get them, your Honor, and have them marked?

The Court: The Clerk will mark them. I would like to suggest that you have them marked as exhibits in the order in which you intend to present them. Where is the anatomical chart?

Mr. Rerat: Your Honor, it will be over here in just about five minutes.

The Court: I do not want anything to be brought in here [3] until I pass on it. I don't want the jury seeing any of these things until I pass on them. In fact, I am much more interested in that than I am some photographs of the railroad cars.

Mr. Rerat: Your Honor, that is why the chart will be here. It will not be displayed to the jury

until your Honor has had an opportunity, and Counsel, to check it over, and then if there is any objection Counsel can make it. Could I have this marked, then, Mr. Clerk?

The Court: Yes, the Clerk will mark them in the order in which you wish them marked, Mr. Rerat.

(Aerial photographs marked Plaintiff's Exhibits 1 and 2 for Identification.)

(Photographs marked Plaintiff's Exhibits 3, 4 and 5 for Identification.)

(X-rays marked Exhibits 6-A, -B, -C and -D for Identification.)

(Hospital Report marked Plaintiff's Exhibit 7 for Identification.)

The Court: In Case No. 8874, Gentlemen, is it stipulated the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor. [4]

The Court: Do you wish to make an opening statement to the jury, Mr. Rerat, on behalf of plaintiff?

Mr. Rerat: Yes, your Honor.

May it please the Court, Counsel, counsel for defendant, and you folks who have been selected to hear and try this matter, it is customary for the lawyer who represents the injured party in a case of this kind to make an opening statement, with only one view in mind, and that is to give you a mental picture of what the plaintiff's case is about

so you will be able to follow the testimony a little more closely.

We are here because of the fact that on the 6th day of February of 1955, where this accident happened near the street that will be designated as 17th Street and, I believe, in the locality of York Street, at that time the plaintiff, Frank Reiner, was working as a pilot-herder-switchman for the defendant railway company, the Northern Pacific Terminal, where the accident happened, a collision between an engine and a cut of cars. As a result of this accident the plaintiff, Frank Reiner, was very seriously injured.

You will find the facts further to be that Mr. Reiner at that time was a man 57 years of age. He lived at 2035 Ellis, Southeast. He had worked almost 35 years continuously for this railroad company. He went to work on the [5] day of the accident, February 6, 1955, about 3:30 in the afternoon. He was going to work from 3:30 in the afternoon until about 11:30 that evening. When he reported to work, he reported at his regular place where he reported every day at the Northern Pacific Terminal. He was going to work during that time as a pilot-herder-switchman with an engine crew made up of a hostler and his assistant, or what sometimes is called the engineer and the fireman.

It was his duty during the time he worked as pilot-herder-switchman to cut off the engines when they came—on passenger trains, when they came into the Northern Pacific Terminal. He was to cut these engines off. I use the term “cut off.” It means

to just uncouple, and then he would do the work of a switchman in connection with any opening and closing of switches or anything that was necessary like that when the engine would be taken from the terminal to the Lake yards. That is Guilds Lake yard, where the engine would be serviced. That, I believe, was about two miles out from where the terminal station was located. From 3:30 until approximately 8:00 o'clock on this particular day Mr. Reiner did his regular duties cutting off these engines, various engines, and then about 8:00 o'clock a Southern Pacific train came in, and this train had what is called a double-unit Diesel engine attached to it. So when the train came into the terminal it was uncoupled from the [6] rest of the cars by Mr. Frank Reiner. He got on the engine and went with the engineer. Of course, the engineer operates the engine, and the fireman also is in the cab of the engine, one on one side and one on the other. They took these two engines—it was a double-unit Diesel—the two units were taken down to the service yards at Guilds Lake. It took probably about a half-hour to forty-five minutes. Down there during that time the plaintiff, Frank Reiner, just waited. Then after the work was completed there the engine started out to return from Guilds Lake to the terminal. At that time the engineer or hostler, the man who operated the engine, was a man by the name of Myers. The fireman's name was Moore. There was also along on the return trip a boilermaker by the name of Bray, an electrician and a machinist. About a half mile from where the Lake yard service

station is located it is necessary for the switch to be operated so the movement can proceed onto the main line to the depot. From that point on there are two main lines, one that will be referred to in the testimony as the westbound main line and the eastbound main line. These two tracks ran in a generally northerly direction and a southerly direction. The track on the east side is the eastbound main line, and on the west is the westbound main line. Coming back from Guilds Lake yards the engines would proceed on the westbound main-line track, and, of course, leading off from [7] these two main-line tracks there are other tracks, what will be referred to as cross-over tracks. They started off from Guilds Lake yards at around a quarter to 9:00, and at that time Mr. Reiner, I believe, was riding in the front unit. These two units were back to back. That is the way they came in, and that is the way that they—after they were worked on in the service yards that is the way they started to the depot.

At the place where the accident—where the movement was going to go onto the main-line track Mr. Frank Reiner got off to operate the switch so the movement could be allowed on the westbound main track. He then got on the second unit and just sat in the, I believe in the cab, which the cab would be on the back end, or that would be on the north end, and the engine proceeded on the main-line westbound track towards the terminal station. After they had gone some distance to a point that will be described as 17th Street, there was a stop of these two units. The engineer in front stopped the units.

Now this was a sort of dismal night. It was rather misty at the time, and I believe it had been kind of drizzling for quite some time. When the unit stopped, Mr. Reiner gave no signal for any stop, knew nothing about what the stop was made for. All he knew was that the units had stopped.

In a few minutes the fireman, Mr. Moore, came back [8] to the second unit where Frank Reiner was sitting just by the engineer's seat, and he told him to get up from his seat, and as he got up, when he got up he noticed that Mr. Moore used the phone—there is a phone in the place where the engineer sits in the back—then immediately he gave the buzz three times, which meant for a back-up movement. That would be, instead of proceeding towards the terminal, to back up towards Guilds Lake yards.

The motors of these two Diesels had been going even when they were stopped so that after Mr. Moore had given the signal through buzzing the engineer, the unit went back with a sudden jerk, and it knocked Mr. Reiner off-balance a little, and then before he had a chance to do anything, had just about hollered to "Hold it," there was a sudden violent impact——

Mr. Gearin: Your Honor, may I object to Counsel's argument. In a case of this kind I think he has gone beyond the point of an ordinary opening statement.

The Court: The jury will understand that anything Counsel is saying to you now is not evidence at all in the case. I usually expect counsel somewhere, Mr. Rerat, to tell the jury that.

Mr. Rerat: Yes, your Honor.

The Court: And to preface their remarks by "We expect the evidence to show." What Counsel is saying to you, Ladies and Gentlemen of the Jury, you should put it in this light: [9] The plaintiff expects to prove; the plaintiff expects the evidence will show that these things are true. Nothing is being said to you as at all evidence in the case. It does not amount to anything as evidence in the case, just Counsel's talking to you about what he hopes to be able to prove in the case so that you will be able to follow it. The theory of the opening statement is that you will be better able to follow the evidence. I always think counsel would do much better to make those opening statements very brief.

Mr. Rerat: Thank you, your Honor.

We expect to prove by the evidence in this case that there was a violent impact between the second Diesel engine and the cut of cars, I believe about 35 cars, that was on the east track and had crossed over to the westbound track.

At the time of this impact Mr. Reiner was tossed around in the cab frontwards and backwards and then from side to side, and while the train—after the impact while the movement was proceeding the two trains were still bumping, and Mr. Reiner jumped out of the cab into a ditch.

The evidence will show that as a result of this impact and as a result of his jumping that he received injuries to his right knee, his left leg and knee, his hip and his back. The evidence will further

show that he was taken to the Good Samaritan Hospital; that he remained there [10] a short time. He was then taken home by his son. He remained home for quite some time, and he was under the care of the company doctor, a Dr. Mundal. The evidence will further show that he was taken to the hospital sometime a little later and that he was placed in traction, weights and things on both legs.

The Court: Just do not describe it. It will all be described to the jury, Mr. Rerat.

Mr. Rerat: Yes; thank you, your Honor. Furthermore, that later on there was an operation performed by the company doctors.

Now, the evidence will show that as a result of this accident Mr. Reiner suffered a great deal of pain during that time and that as a result of these injuries that he is permanently and totally disabled from performing the work that he had done for 34½ years.

That is substantially what the plaintiff's testimony will show. Thank you.

The Court: Mr. Gearin.

Mr. Gearin: If the Court please, Ladies and Gentlemen of the Jury, by this time you know there are two sides to every case.

Our evidence will show that there had been a rule promulgated against the men doing what they were doing at this time. A rule had been out just a few days in which the [11] plaintiff had been told that they were not to road-test these engines; that when he was in the back of the two units, as Mr. Rerat has told you, they went this way (indicating), and

then they backed up. According to the rules with, which the plaintiff was familiar, the evidence will show that he as a pilot-herder was in charge of the movement and that it was his obligation to see that it was done safely.

At a point four or six hundred feet from the point of the accident they came in on this track. The evidence will show that the other train, they call it a cut or break, and all that means is that the locomotive in the switchyard is taking a bunch of cars some place else—their instructions were to wait until this went by and they were to cross over, and that they started up, and at that time before they started Mr. Reiner knew that they were going to make a road test; that the evidence will show that Mr. Moore came back and did something about the headlight. They have headlights on both ends. Mr. Reiner told him to put the lamp on dim; that thereafter they started back a distance of from four to six hundred feet, at which time, the evidence will show, it was the obligation of the plaintiff to see that this was done safely.

The evidence will show that while he was in charge of the movement, due to his neglect an accident happened. After the accident happened Mr. Reiner jumped. He was the [12] only one in the cab of the three in the front end, he was the only one who did, and he is the only one who received injury.

After the accident there was a disciplinary hearing, about which you will hear more later on; that Mr. Reiner went back to work, and he complained

about his back, and the company doctor sent him to Dr. Carlson, a specialist in the field of orthopedics, who took care of him and did some work on his back. I think the testimony will be from Dr. Carlson, who has treated him and observed him, that the man is in good condition. The testimony, we believe, will be to the opposite by Dr. McMurray, likewise an orthopedist, who saw the plaintiff last week, I understand, for the first time only to prepare for trial.

Now, we ask you, please, when you hear this case to wait, please, until you hear our side of the case, to see who is responsible for the accident and the amount of, the nature and extent of the present injuries of the plaintiff who is seeking damages in this case. Thank you.

The Court: Plaintiff may call his first witness.

Mr. Rerat: Your Honor, I call the plaintiff as our first witness. [13]

FRANK REINER

plaintiff, called in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. Frank Reiner.

Q. Where do you live, Mr. Reiner?

A. 2035 Southeast Ellis Street.

Q. I am going to ask you to speak loud enough so all the jurors will hear you and counsel for the

(Testimony of Frank Reiner.)

railroad company on the other side will also hear you, please.

Will you tell us how old a man you are?

A. Fifty-nine.

Q. What was the date of your birth?

A. 1897, October 30th.

Q. On February 6, 1955, were you injured in a railroad accident? A. Yes, sir.

Q. At that time by whom were you employed?

A. By the Northern Pacific Terminal Company.

Q. How long had you been employed by the Northern Pacific Terminal Company prior to February 6, 1955?

A. Since the 20th of May, 1921.

Q. So that was almost 35 years?

A. Just about 35.

Q. Was that service of 35 years continuous?

A. Yes.

Q. Where did this accident happen on February 6th?

A. What is known as the westward main line of York Street cross-over switch.

Q. Will you tell us about what time of the day or night it happened?

A. It was just about around 9:15 p.m.

Q. At the time that this accident happened, what kind of work were you doing for that Northern Pacific Terminal Company? A. Pilot herder.

Q. During the 35 years that you had worked for the company, when you first started in what kind of work did you start in doing?

(Testimony of Frank Reiner.)

A. Switchman.

Q. Then how long before the 6th of February of 1955, did you do the work of pilot-herder?

A. Oh, about four years or better.

Q. What time did you go to work on this particular day? A. 3:30 p.m.

Q. For how long have you lived in the City of Portland, Mr. Reiner?

A. In Portland, 36 years in May. It was 36 years last May. [2*]

Q. You say you went to work at 3:30 in the afternoon that day? A. Yes.

Q. Where did you report to work at?

A. At the depot yard office.

Q. You were going to work from 3:30 on until approximately what time? A. 11:30 p.m.

Q. Between 3:30 in the afternoon and 8:00 o'clock that night, where did you do most of your work?

A. At the Union Depot cutting off engines and tying on passenger engines.

Q. Will you tell us first what are the duties of a railroad switchman? A. Switchman?

Q. Yes.

A. Well, that is switching cars in the yard, placing them on one track or another; sorting them; placing of trains.

Q. Do you have any duties in connection with opening and closing knuckles? A. Yes.

Q. Anything else?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Frank Reiner.)

A. Well, we have to set brakes, go up high on the boxcars, set brakes.

Q. Will you tell us what the duties are of a pilot-herder-switchman? [3]

A. It is to cut off the engines on these passenger trains when they come in the depot; also to couple them onto the passenger trains for the trains that is to go out, and if there is any engines that has to be serviced, you take them out to Guilds Lake there on the service track, and it is my, the pilot's duty to line the switches and such as that.

Q. Is this work considered light or heavy work?

A. Yes, it is heavy; it is heavy.

Q. In working in your duties on that particular day as pilot-herder did you work with some individuals who operated the train?

A. Yes, I did.

Q. Will you tell us the man's name that was the engineer, the man who operated the engine?

A. The engineer's name was Mayers.

Q. Will you tell us the name of the fireman?

A. The fireman's name was Moore.

Q. As a pilot-herder-switchman, do you have any duties of any kind in connection with the operation of that engine mechanically in any way?

A. No, sir.

Q. Or are you allowed to touch any part of the mechanism of that engine to work it?

A. No, sir. [4]

Q. About 8:00 o'clock that evening, that is, the

(Testimony of Frank Reiner.)

evening of February 6, 1955, did a Southern Pacific train come into the depot?

A. Yes, sir.

Q. When it came in, what did you do?

A. I uncoupled the train and got on with the engineer and fireman in front, and we proceeded to the Guilds Lake yards, and there placed the engine on a service track where they were serviced.

Q. Mr. Reiner, tell us the approximate distance from the terminal where the train was cut off to the Guilds Lake yard.

A. It is about, I would say, two miles; maybe a little bit better.

Q. Will you tell us what kind of locomotive engine or engines did you cut off this one Pacific train about 8:00 o'clock that night?

A. Diesel unit, two units, Diesel.

Q. When you cut them off and when you took them to Guilds Lake yard, will you tell us how they were connected together?

A. They were back-to-back. In other words, there was a cab on each end, and they can be operated from either end, but they was back-to-back. That is the way they were.

Q. The two units then were together, and you went with the—you got in the units with the fireman and engineer. Are they sometimes called another name? Are they called [5] another name besides engineer and fireman?

A. Hostler and hostler helper.

(Testimony of Frank Reiner.)

Q. When you proceeded from the terminal to the Guilds Lake, on what side would the engineer be?

A. On the right side.

Q. On the right side? A. Yes, sir.

Q. On what side would the fireman or hostler helper be? A. On the left side.

Q. Going down to the Guilds Lake yard from the depot that evening, did you have any duties as far as opening and closing a switch or anything like that, on the way down, Mr. Reiner?

A. Except at the yards after we got out there, to line switches, to put them on the service track.

Q. Then after the engine or the two units arrived at Guilds Lake yard, what was done with those units?

A. Well, they serviced them there, wash them, put oil in there, and machinists and electricians work on them and fix them up ready to go back out again.

Q. Mr. Reiner, do you have any duties of any kind in connection with the engine when it was in the Guilds Lake Yard? A. No.

Q. Well then, after it was there for awhile did they start out then to return to the depot? [6]

A. Yes.

Q. About what time was it that this, that you started out from Guilds Lake Yard to return to the depot?

A. It was about around 9:00 o'clock, I would say, or shortly before.

Q. From the depot to the Guilds Lake Yards

(Testimony of Frank Reiner.)

are there two main-line tracks? A. Yes.

Q. Will you tell us how these main-line tracks are designated, please?

A. Eastward main and westward main line.

Q. When you left the terminal to go out to the yards, what track did you go out on?

A. We went out on eastward main.

Q. Then coming back you would come back on what track?

A. On the westward main, main line.

Q. These tracks run in what general direction?

A. Northerly and southerly at this——

Q. After you had left the yard for some distance, did you do anything about the switches to bring the movement on the main-line track?

A. Yes, about a half mile from where we started at the Guilds Lake Yard there until we hit the main line is about a half mile, there is a switch that I have to throw to let the engines, these Diesels, onto the main line. [7]

Q. When you started out from Guilds Lake Yards, who was the man operating the engine in the front? A. Meyers, Engineer Meyers.

Q. And the fireman, Mr. Moore, the same two as you went out? A. The same two I went out.

Q. Besides Mr. Meyers, Mr. Moore, and yourself, will you tell us whether or not there was anybody else in the two units with you?

A. There was an electrician and a machinist and a boilermaker.

Q. After you had thrown the switch so the move-

(Testimony of Frank Reiner.)

ment could proceed on the western main track back to the depot, where did you then go?

A. I was on the trailing unit in the cab, in the rear end.

Q. After you got in there, was there anybody else in there besides you?

A. Yes, there was the boilermaker. He was sitting on the—which would be the fireman's seat on this end where I was at.

Q. What was his name, if you remember?

A. Bray.

Q. Bray. Then as you proceeded then on the main-line track after the work, opening, or whatever you did to this switch, then what else, if anything, happened before you got to the terminal? [8]

A. Well, just before we got to the 17th Street cross-over the engines, these Diesels, they come to a stop.

Q. Did you give any signal for a stop?

A. No, I didn't.

Q. Did you know these engines were going to stop?

A. No, I didn't.

Q. Were you told at any time?

A. No, sir.

Q. That they were going to stop?

A. No, sir.

Q. Then when they stopped what was the next thing that you observed?

A. That Fireman Moore, he come to the rear through the inside of these engines, and he says to me, "Get off of the seat, Frank." I immediately

(Testimony of Frank Reiner.)

got off. I says to him, "What is the matter now?" He says, "There is something that we want to try out, and we might even have to go to the Lake Yard."

Q. What happened then?

A. Well, he picked up the phone and was talking to the engineer or whoever he was talking to on the other end, I don't know, and then he turned on the light and pressed a button three times, and the engine commenced to go back with a lurch, and I either did say, I tried to say, "Hold her," or did say it, I don't know, and the next thing I [9] knew, why, in a few seconds, why, we hit and come to a violent collision with some cars on the main line.

Q. Mr. Reiner, will you tell us that particular time and for some time before you left the Guilds Lake Yard what kind of an evening was this?

A. It was a drizzly rain.

Q. When you left the depot—or that would be the terminal—did you do anything else about any lights as far as a second unit was concerned?

A. Yes, it is my duty to put on two red lights on the rear end of these trains as it would be just like on a train rear end.

Q. Those red lights remained on the, that would be the second Diesel, the hind Diesel, for how long?

A. They remain there until, from the time you leave the terminal until you get back again to the Union Depot.

Q. Do you have any duties of any kind with the operation of the light on the engine that is used

(Testimony of Frank Reiner.)

for the fireman and engineer to see up in front, that big headlight?

A. No, I have nothing to do with it.

Q. But you did see Mr. Moore turn that on, you say? A. Yes.

Q. Was there anything said by him at that time or by——

A. Well, he says, “Are they on bright?” And as the windows was so dirty and raining, you couldn’t tell whether the lights [10] was on bright or dim, and I said, “Dim.”

Q. As Moore gave these three buzzer signals, that meant what? A. To back up.

Q. Did he tell you before that or when you were at the terminal or when you were at Guilds Lake or any place before Mr. Moore started to buzz three times, did you know anything about any back-up movement? A. No, sir; I did not.

Q. While the units were standing there after—when they stopped did—will you tell us whether the engines were going at that time?

A. Yes, these motors, they run just the same while they are standing as if they were running. They are going continuously.

Q. How long after the third buzz did the movement start back? A. Just immediately.

Q. And when it started back, what happened to you at that time?

A. Well, it kind of threw me off my balance, and by the time I got my eyes up, I looked at the

(Testimony of Frank Reiner.)

window, I was going to say, "Hold her," or did say—I was already saying, "Hold her," and it was just a matter of seconds that it took, why, we went into this collision with the other train. [11]

Q. Now, under those conditions, Mr. Reiner, is such a movement a safe movement?

A. No, because it was making a movement against the current of traffic which is not practicable or practical or is never made.

Q. If you were informed by either Mr. Moore or by Mr. Meyers, the engineer, that they wanted to make a back-up movement like what was made at that time, what was the custom and practice to be followed by you or any other pilot herder?

A. Well, the only way it could be made on a main line would have to be to have a train order and go back and flag, send a man back on the main line to protect against other trains which would be coming and might be coming at any time, which they was there all the time, keep coming from the other way. You have to have somebody there to flag, to flag the movement.

Q. Would you have to have permission from anybody to make such a movement?

A. Yes, you would have to have permission from either the Yardmaster, which would be in our case, there is no trainmaster there, or the operator have a train order or something. He should have something.

Q. How would that have been done by you?

A. I would not have made that move under no

(Testimony of Frank Reiner.)

conditions that way. If they had wanted to have gone back, I would cross over onto the other eastern main line, and we would have went back [12] that way, which was the proper way to have went.

Q. Were you familiar with the bulletin that was put out by the Terminal Company on February 2, 1955, on such movements?

A. That was not in our department.

Q. Was there a bulletin put out?

A. There was.

Q. Against making such a move?

A. Making such a move.

Mr. Gearin: Counsel, may I correct you?

The Court: I cannot hear you.

Mr. Gearin: I was calling counsel's attention, I think he misspoke himself. I think that is Bulletin 69.

Mr. Rerat: Bulletin 69, yes, that is correct.

Q. Now, Mr. Reiner, at the time of this impact what was the approximate speed of the units at the time of the impact, would you say?

A. I would have said it was between 25 to 30 miles an hour.

Q. And the distance that was traveled from the time that you started up to the time of the impact was approximately what?

A. About twelve boxcar lengths.

Q. When you say twelve boxcar lengths, you have in mind a boxcar being about how long?

A. Forty feet. [13]

Q. So that would be about 480 feet?

(Testimony of Frank Reiner.)

A. Yes.

Q. Approximately? A. Yes.

Q. After the three buzzes were given by the fireman and the engineer started up in the manner that he did, was there anything that you could have done to have prevented that movement?

Mr. Gearin: Object to the form of the question, your Honor.

The Court: Sustained.

Q. (By Mr. Rerat): Under the circumstances as existed at that particular time, would you say that—and from the time the movement started up to the time that the impact took place when you say you first knew about this, how much time elapsed, approximately?

A. It was just a matter of seconds, just seconds.

Q. When the impact happened, that is, the engine came in contact with something else, did you find out what it came in contact with?

A. Yes.

Q. What was it?

A. With another train or cars that were crossing over from the eastward main to the westward main.

Q. Mr. Reiner, when your engine stopped at the place you [14] stated it did on 17th Street, will you tell us whether there was a cut of cars on the east-bound main? A. Yes, there was.

Q. Did you have anything to do with those cars?

A. No, I did not.

Q. Did you know where they were going or what movement was to be made or anything else?

(Testimony of Frank Reiner.)

A. No, I did not.

Q. Will you tell us the distance between the westbound main and the eastbound main?

A. Oh, it's approximately about 40 feet across from one track to the other; right in there, I imagine, was about right.

Q. At the time of the impact, will you tell us just what happened to you?

A. Well, when they hit it hit with such force that it kind of dazed me, threw me forward, backward, right side and to the left side, and my body parts hit different parts in the engine there, which hurt me all over in different places, and everything was, looked like it was on fire, so I opened the door, and my one thought was to get away from this fire and to get out of there, and the engines seemed like they was leaning to this one side, and I knew I couldn't get out of the other side so I opened the door, and my idea was to jump and jump as far as I could to get away from the [15] fire and the engine and also from them falling on me if they were off the track—it looked as though they were—and I jumped out.

Q. Did you jump then—on what side would you say you jumped out?

A. On the left side.

Q. Would that be on the west side?

A. That would be on the west side.

Q. When you were knocked forward, backwards, and side-to-side, were you knocked unconscious at that time or not, first impact?

(Testimony of Frank Reiner.)

A. I was dazed and shocked. I didn't, I wasn't altogether.

The Court: We will take the noon recess at this time until 2:00 o'clock.

Before we separate, I again must admonish you that it is your duty, Ladies and Gentlemen, not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this trial and not to form or express an opinion on the case until after it has been finally submitted to you for your verdict. You are now excused until 2:00 o'clock this afternoon.

(Noon recess taken.) [16]

AFTERNOON SESSION

(Pursuant to noon recess the proceedings were resumed at 2:00 p.m.)

The Court: You may proceed, the plaintiff was on the stand, I believe.

Mr. Rerat: Yes, your Honor. Will you take the stand, please?

Your Honor, I want to apologize for not standing when I was asking the witness questions just before lunch. I didn't know that was the practice.

The Court: That is quite all right, you have a very good voice, he can hear you very well.

Mr. Rerat: Well, thank you.

Do you have the last question and answer, please?

(Whereupon the preceding questions and answers were read as follows: "Question: Did you

(Testimony of Frank Reiner.)

jump then; on what side would you say you jumped? Answer: On the left side. Question: That would be on the west side? Answer: That would be on the west side. Question: When you were knocked forward, backward, side-to-side, were you knocked unconscious at that time or not—first impact? Answer: I was dazed and shocked. I didn't—I wasn't out altogether.'')

Direct Examination

(Continued)

By Mr. Rerat:

Q. Now, counsel mentioned this morning about Bulletin 69. After this accident happened on February the 6th of 1955, did you become aware that there was a Bulletin 69?

A. Yes, at the investigation.

Q. And was that—will you tell us what Bulletin 69 had reference to?

A. That was reference to the engineers and firemen, they were not to make any test runs on these S. P. Diesel locomotives any more on the main line.

Q. Now, was such a bulletin issued to you as a pilot-herder switchman at any time?

A. No, sir.

Q. And did the power testing that the Bulletin had reference to, did that have anything to do with any of your duties or work with this railroad company?

A. No, sir.

Q. And when such a bulletin is issued, you said it was issued to the firemen and engineers, would

(Testimony of Frank Reiner.)

it be issued in a place where you would be able to see it; it would be put up? A. No, sir.

Q. Now, as a result of you being pushed from one end, or one side to the other in the cab of the locomotive that you were in at the time of the impact, and side-to-side movement, [18] and then you said you jumped as a result of this accident, what injuries, if any, did you receive?

A. My left leg and knee and hip and back and my right leg.

Q. Now Mr. Reiner, there has been marked Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2, which are aerial views of the scene where this accident happened. Now, I'd like to offer in evidence at this time Plaintiff's Exhibits 1 and 2, and I understand there is no objection?

Mr. Gearin: I have only seen 1.

Mr. Rerat: Oh, excuse me, the other one is practically the same.

Mr. Gearin: They are both here and they are the same, I don't think I have any objection to either, your Honor.

The Court: Is it stipulated that each of them fairly depicts what it purports to be in reference to the scene of the occurrence?

Mr. Gearin: Yes.

Mr. Rerat: Now your Honor, I could have Mr. Reiner have the exhibit placed here so he could explain to the jury the direction of the tracks.

The Court: Yes, the plaintiff may place it wherever you wish.

(Testimony of Frank Reiner.)

Q. (By Mr. Rerat): Now Mr. Reiner, will you step down here, please? Mr. Reiner, will you first show us what direction is north on Plaintiff's Exhibit 1? [19]

A. This main line here (indicating) is north.

Q. That would be the top of the aerial view; is that correct; and the south would be the bottom?

A. Would be this one here (indicating).

Q. And to the right would be east, then?

A. East.

Q. And to the left would be west?

A. This way (indicating).

Q. Right. Now, you have referred and talked about the west main-line track. Will you show us on Plaintiff's Exhibit 1 where the west main-line track is located; do you have a colored pencil? I have one here, I don't know whether it would work or not. Now, will you mark on the west-bound main-line track, will you put west main or W.M.1, showing us where the——

A. W.M.1——

Q. And will you take the pencil and mark E.M.1 for the east-bound main line?

A. East-bound 1.

Q. Then, will you take the red pencil and will you mark at the approximate position that the unit that you were riding in, the two Diesel engines when you came from Guilds Lake Yards and the stop was made at, you said at a place you said was 17th Street, I believe, or around there, would you show us—can you show us on this? [20]

(Testimony of Frank Reiner.)

A. Right here (indicating).

Q. All right. Now, will you draw a line right across the west-bound track, and will you put that F.R.1? A. This way?

Q. Yes. Now, will you show us the approximate position where the cut of cars was located on the east-bound main-line track when your unit stopped at the place you have designated as F.R.1?

A. The engines from the other train was right here (indicating).

Q. All right. Now, will you——

A. And the cars was here (indicating). The train, the whole train was sitting on the main line back this way (indicating).

Q. Now, will you draw another line on the east-bound main-line track and show us where the approximate place of the engine of the cut of cars that was on that east-bound track was located, and put an X.F.R.2 or 3, rather, that would be, wouldn't it?

Mr. Gearin: No. 2.

Mr. Rerat: All right. Now, would you at the place you have designated as F.R.2—is there a cross-over switch or cross-over track from the east-bound main line to the west-bound main line?

A. Yes. [21]

Q. All right. Will you just draw that in red pencil, showing the cross-over track? Just draw a line with your red pencil.

A. All the way up?

Q. Yes. Now, will you tell us where the impact

(Testimony of Frank Reiner.)

took place between the unit you were on and the cut of cars that it ran into?

A. Right there (indicating).

Q. And will you just mark an X there, please, at the approximate—and put that X.F.R.3. Now Mr. Reiner, you stated that you saw a blaze, everything seemed to be afire. Did you find out later what had caused that blaze or that fire?

A. Yes. When we—when these engines that I were on hit here (indicating) and knocked—took part of one car off—knocked—I think it was two of them off over here (indicating), there is a telephone pole over here (indicating) with some high—with some transformers here (indicating) and it broke the pole and that put everything on fire up there. Everything was hanging, however, I don't think the wire was broke. It just throwed flame that you could see all over the City of Portland.

Q. Now, you were in the vicinity of where the impact took place between these two cars, that is the engines and the cut of cars, did you see a man from the other crew; that would be from the crew that had been on the east-bound main-line track; do you remember seeing anybody there?

A. Yes, after I got up and we got back over here (indicating) there was—I seen a man coming from here (indicating) from the other engine here (indicating), coming down this way (indicating).

Q. Now Mr. Reiner—your Honor, at this time, the plaintiff would like to offer in evidence Plaintiff's Exhibits 3, 4 and 5.

(Testimony of Frank Reiner.)

Mr. Gearin: No objection.

The Court: Received in evidence.

(Plaintiff's Exhibits 3, 4, and 5, heretofore marked for identification, were thereupon received in evidence.)

Q. (By Mr. Rerat): Now, showing you Plaintiff's Exhibit 3, Mr. Reiner, will you tell us what that is?

A. That is the Southern Pacific Diesel unit engine.

Q. Is that one of the units that you were——

A. Yes, that's the unit I was in.

Q. And showing you Plaintiff's Exhibit 4, will you tell us what that is?

A. That's after that end you see there went by, and took off part of a boxcar from this other train, and strew all the pieces and everything all over the engine. There was steel flying all directions, and fire, and this here (indicating) is the telephone pole that was broke off where these [23] transformers was on, which throwed the flame. Here are the wheels from the first boxcar, I think it was.

Q. And showing you Plaintiff's Exhibit 5, will you tell us what that is?

A. Well, that's also part of the wreck there, and the car, part of the car that was in it, wheels from some of the tanks that was completely throwed off of the track.

Q. You may be seated now, please. Now, when you jumped from the engine, when you saw that fire,

(Testimony of Frank Reiner.)

the engine stopped—or was it moving, that you were on? A. They were still moving.

Q. Now, did you observe afterwards what part of the cut of cars that had been on the east-bound main-line track collided with the back end of your engine? In other words, how far back from the engine was the impact?

A. I'd say—I couldn't just exactly say—about five or six cars, six—seven cars in there.

Q. Now, we noticed that the cross-over track from the east-bound main track to the west-bound main track, when the east-bound main track had been changed by the switch, that opens the track leading off from that to the track on the west-bound main-line track. If the track is lined up from the east to the west-bound main-line track, is there a switch stand that shows a green or a red sign?

A. Yes. [24]

Q. And if the track extending from the east-bound main-line track to the west-bound main-line track is lined up, then what color would be the switch that would be on the other side, on the west side of the west-bound main track at that point; what—would it be green or red? A. Red.

Q. Red, and red would indicate to anybody, what?

A. That the track was not clear, the switch was wrong.

Q. Now Mr. Reiner, this morning you said that if you had been told by the engineer that he wanted

(Testimony of Frank Reiner.)

to make a left or a backward movement, that you would have gotten down from the engine and walked in back of the engine down towards that cross-over track, and why would you have done that?

A. To protect the inbound or traffic on the main line from the north.

Q. And is that the customary and usual way of doing that work?

A. Well, no, you wouldn't do it. Usually, this move is never made, but that would be the only possible way it could be made.

Q. In case of necessity?

A. Of necessity.

Q. Now, what part of your person came in contact with the ground that you landed on?

A. How is that? [25]

Q. What part of your person came in contact with the ground? In other words, how did you fall and what did you fall on?

A. I tried to jump as far as I could, and I landed on my left foot, and with the force and the height, I fell—rolled over, kind of on my left side and I tried to—just crawled or anything—just to get away from the accident there because I didn't know but what the engine was going to fall over on top of me.

Q. Were you suffering pain at that time?

A. Yes.

Q. Where?

A. My leg and knee and hip and back.

(Testimony of Frank Reiner.)

Q. Where was the pain the worst?

A. Well, the worst was in my leg.

Q. Well then, after the impact and the cars came to rest, then were you taken any place from the scene of the accident? A. Yes.

Q. Where were you taken to?

A. To the Northern Pacific Terminal Company yard office.

Q. And how were you taken from the scene of the accident to the terminal office?

A. By another S.P.&S. switchman in his car.

Q. Well, then, when you arrived at the terminal office there, what was done for you?

A. After I sat around there for quite awhile waiting for [26] the general yardmaster, he was to come, he was to haul me to the hospital because he—as he did not show up, why, the boys in there they had my son take me.

Q. Well, is your son—was your son working for the railroad company at that time? A. Yes.

Q. What does he do? A. He is a clerk.

Q. And he was working there at that time?

A. Yes.

Q. And he is still working for them; is that right? A. (Witness nods head.)

Q. What hospital did he take you to?

A. The Good Samaritan.

Q. Good Samaritan Hospital. Now, when you arrived there, will you state just what was done for you at the Good Samaritan Hospital?

(Testimony of Frank Reiner.)

A. Well, they—the intern X-rayed my knee, my leg.

Q. And you were just—you said that you were treated by a regular doctor or just by an intern there? A. Just an intern.

Q. And after you were given first aid, where were you taken to?

A. Well, they—the main doctor wasn't there so this guy didn't seem to think it was so serious, they sent me home. [27]

Q. Well then, when you arrived at home, who was at home when you reached there?

A. My wife.

Q. Then what was done with you at home?

A. Well, I was put to bed.

Q. Then will you tell us what kind of a night you put in that first night?

A. Well, a very bad one it was.

Q. Were you suffering pain?

A. Yes, very bad.

Q. Were you suffering pain? A. Yes.

Q. Where?

A. My leg, my hip, my back.

Q. Now, the next day, that would be on February the 7th, what was done the next day; did you call a doctor or what did you do?

A. Well, I had been told to come up to the doctor's office, but I couldn't even get out of bed. So the wife, she called the doctor and told him it was impossible for me to come up there.

Q. What doctor was that?

(Testimony of Frank Reiner.)

A. Dr. Mundal.

Q. And he is a company doctor, is he, for the Northern Pacific Terminal Company? [28]

A. Yes.

Q. Did Dr. Mundal come out that day?

A. No.

Q. When did he come out then?

A. He didn't come out until the 10th of February.

Q. Well, during that time what—were you in bed? A. Yes.

Q. And who was taking care of you?

A. My wife.

Q. Now did Dr. Mundal give her instructions over the telephone as to what to do for you?

A. Yes.

Q. And will you tell us just what your wife did during this period?

A. Well, she was instructed to put hot towels on my knee and leg and hot pads on my back, and, well—she didn't have anything else so she just gave me Anacins.

Q. Well now, at that time what did you observe about your left leg, if anything, that is, the first night at home?

A. Well, it was swelling up and whenever I would try to sit up or get out of the bed to go to the bathroom, it would turn black-and-blue and swelling pretty bad and pained severely.

Q. Well now, how did you get around from your

(Testimony of Frank Reiner.)

bed to the bathroom, between the 6th and the 10th when the doctor arrived? [29]

A. With crutches and the help of the wife.

Q. Did you have a pair of crutches at your home? A. Yes.

Q. Now, the 10th when Dr. Mundal came, will you tell us just what he did, and just what treatment he prescribed for you?

A. Well, he came on the 10th, and after he seen my leg, and——

Mr. Gearin: Just a moment, I object on the grounds that it is hearsay. The doctor is available as a witness if called.

Mr. Rerat: Now just a minute, do you mean you object?

The Court: Direct your remarks to the Court.

Mr. Rerat: Yes, your Honor, well——

The Court: Instruct the witness not to——

Mr. Rerat: Yes, not to testify, not to testify saying anything, any conversation between you and the doctor, see, but did the doctor check you over?

The Witness: Yes.

Q. (By Mr. Rerat): All right. Then what — that was on the 10th, was it? A. Yes.

Q. Then what followed on the 10th after the doctor was there?

A. Well, just still kept putting hot packs and the same [30] procedure as before.

Q. Then while you were walking on your crutches there from the bed to the bathroom, did you hurt either one hand or the other?

(Testimony of Frank Reiner.)

A. Yes.

Q. And will you tell us when that was and how that happened?

A. That was on the 12th of February.

Q. And what happened?

A. There is linoleum in our hall, and as I was using these old crutches, I slipped, and as I slipped that throwed in an awful lot of weight from one of the crutches into the palm of my hand and ruptured it, which caused something like a tumor in there, and it got as big as my thumb and it stayed there and it never did go away.

Q. Well then, after the 12th, then, what was done?

A. On the 17th.

Q. That would be February 17th of '55?

A. February the 17th, I was taken in a taxi to Dr. Carlson's office.

Q. And at whose request?

A. Dr. Mundal's.

Q. Then when you were taken to Dr. Carlson's office, what did Dr. Carlson do for you?

A. He X-rayed my leg and back.

Q. Then after you were taken up there, did you return home? [31]

A. Yes.

Q. And then what was done following that?

A. Well, still putting on hot packs and hot towels and everything still the same.

Q. Well now, during the month of February, then, you went to Dr. Carlson's office for X-rays,

(Testimony of Frank Reiner.)

and Dr. Mundal came out to the house; is that correct? A. Yes.

Q. During all that time, were you suffering pain in the parts where you were injured?

A. Yes.

Q. Now, what about—then, in March, what happened during that month?

A. Well, in February there was still——

Q. Well, February, yes. You have nothing more to add?

A. I got worse on the 21st.

Q. Yes?

A. And we called Dr. Mundal, and he came out to the house, and they had to take me with the ambulance to the hospital, Good Samaritan Hospital.

Q. Then how long were you in the hospital on that occasion? A. Four days.

Q. And then while you were there, what was done for you at that time?

A. Well, they just gave me shots and different things while [32] I was at the hospital there.

Q. Well then, after four days being there, you returned to your home, didn't you?

A. Yes.

Q. Then what else was done after that?

A. About the 12th, Dr. Mundal, he told me——

Q. Now, wait a minute, the 12th, is that——

A. Of March.

Q. Yes.

A. I was sent to the Medical-Dental Building for some more X-rays of my back and leg.

(Testimony of Frank Reiner.)

Q. Then who took those X-rays; do you know?
Mundal had you go to——

A. I don't know the name of it.

Q. Well then, what happened after those X-rays were taken?

A. About March the 31st, I had seen both the doctors.

Q. When you say "both," now, you mean——

A. Dr. Mundal and Dr. Carlson.

Q. Yes.

A. And they sent me to Good Samaritan Hospital.

Q. Well then, when you entered the Good Samaritan Hospital in March, that was March the 12th?
A. 31st.

Q. On the 31st, then how long were you in the Good Samaritan Hospital at that time? [33]

A. 14 days.

Q. And will you tell the jury—Court and jury just what treatment you received during these 14 days you were in the hospital at that time?

A. They had me—they put me in traction with weights on both feet for 14 days.

Q. Well now, you say "they put me in traction," you mean you were in bed?

A. Yes, I was in bed.

Q. And what apparatus did they have on you?

A. Weights.

Q. Whereabouts?
A. On both feet.

Q. And the weights?
A. Hanging down.

Q. Hanging down?
A. Yes.

(Testimony of Frank Reiner.)

Q. Were you able to move from side-to-side or did you have to remain in one position on your back?

A. I had to remain right on my back in the same position.

Q. And during all that time, did you continue to suffer pain on the parts of your body that were injured? A. Yes.

Q. While you were in the hospital at that time, were you given sedatives and drugs for the pain? [34]

A. Yes, in the evening or before time to go to sleep.

Q. How long were these weights on both of your legs then, during the entire time you were in the hospital or what?

A. Well, yes, except the last few days they took them off long enough in the morning so that I could go to the bathroom.

Q. And you were under the care of—still under the care of Dr. Mundal?

A. Dr. Mundal and Carlson.

Q. Then that takes us up to about the middle of April of '55. Then where did you go when you were released from the hospital by the doctor?

A. Went back home.

Q. And then what did you do at home?

A. Well, I went up to see Dr. Mundal about the 15th of April.

Q. Of April. A. (Witness nods head.)

Q. Yes.

(Testimony of Frank Reiner.)

A. And he sent me to the Oregon limb place there to have a brace for my back, get a brace for my back.

Q. Now, during the month of April, did you enter any other hospitals, that's of different—

A. No.

Q. Well, now then, the pain continued—did the pain continue in the various parts of your body that you were [35] injured in? A. Yes.

Q. Now then, around the first of June, did you try to go back to work, Mr. Reiner?

A. Yes, the 8th of June.

Q. Was that done at the request of the doctor or did you do that because you wanted to see if you could do it yourself?

A. It was at my request, my own.

Q. You wanted to work if you could?

A. That's right.

Q. And you went back then for how long a period?

A. I worked about—I worked two weeks and it was awfully tough going, rough.

Q. Did you work under difficulty?

A. Awfully difficult.

Q. And during that time were you suffering pain? A. Yes.

Q. Where? A. My leg and back.

Q. Now, when you would finish work at night, what would you do?

A. I'd go home and go to bed.

Q. Well then, after trying to work for this period of time that would bring us up to about

(Testimony of Frank Reiner.)

June, the middle part of [36] June, what then; what did you do after that?

A. I took off a couple of days. I thought I could maybe do better trying it again, and I tried it again and worked a few more days and it was getting worse, and——

Q. Well then, during that period there in June and July there, how long did you work? About how many days?

A. Oh, I imagine about 15 days, around that, something like that.

Q. Now, how many days have you worked since February 6, 1955, up to the present time, about?

A. 30 days, off and on.

Q. Well now, then the last time you tried to work was when?

A. About the middle of August, around in there.

Q. And what happened on that occasion, why did you discontinue?

A. Well, I just couldn't make it no more, it was getting worse.

Q. You not only tried it once, you tried it several times, to work? A. That's right.

Q. Now, during all this time, you say, and in August, when you finished work, what would you do, on Saturdays and Sundays?

A. Oh, I just didn't do nothing, just laid around in bed and took it easy.

Q. Now, during those months, will you tell us whether you [37] were continuing to suffer pain?

(Testimony of Frank Reiner.)

A. Yes.

Q. Where?

A. My knee and my leg and hip and back.

Q. Well then, what happened at that time, that would be on August 1st—around the 1st of September of 1955?

A. I went—August the 11th I went up to see Dr. Carlson and he took some more X-rays of my back and he said it didn't show no improvement.

Q. Well then, did you enter—were you requested to enter the hospital again?

A. Not right away, they put me on a diet first.

Q. And then when did you enter the hospital again? A. October the 2nd.

Q. That's of '55? A. Yes.

Q. Now, during all the month of October, did you continue to suffer pain in the parts you have told us about? A. Yes.

Q. Well then, when you entered the hospital in October, that was when in October; do you remember? A. The 2nd.

Q. What hospital did you enter?

A. Good Samaritan.

Q. How long were you in the hospital on this occasion? [38] A. 29 days.

Q. And what doctors took care of you during this period?

A. Dr. Carlson, Abele, and Dr. Mundal, too.

Q. Now, while you were in the hospital this time, what—did you undergo any operations?

(Testimony of Frank Reiner.)

A. I had a spinal fusion operation on my back.

Q. And when was that done?

A. October the 4th.

Q. And were you given a general anesthetic?

A. Yes.

Q. That was done on October 4th of '55?

A. October 4th.

Q. Now, while you were in the hospital, were you suffering pain? A. Yes.

Q. Where? A. My back, my leg.

Q. Now, then you were released from the hospital when? A. October the 29th.

Q. And what has been the situation, Mr. Reiner, from that time up to the present time in '57?

A. Well, I still have pain in my back, continuous pain in the back and down my left leg.

Q. Now, from the time of this accident up to the present time, have you ever been free from pain in the lower part [39] of your back?

A. No, I have not.

Q. Will you just describe the pain that you have, please, in the lower part of your back?

A. Well, it's from the—where the end of my back there—down into my left leg, the pain—it's kind of a burning sensation of pain in there all the time in there, day and night.

Q. Does the pain get worse at some times than at other times? A. Yes.

Q. And under what conditions does the pain get worse?

(Testimony of Frank Reiner.)

A. When I walk over rough places or go down the steps or stoop, bend, or twist around.

Q. Now, what about the situation as far as your right leg is—the right knee that was injured, how did that come out after the accident?

A. Well, I still have pain in there, too, especially when I go down the steps at times, or when I get up. If I am sitting down, I have quite a difficulty, and I have to go down sideways because it hurts in there all the time, in the knee, right in the knee.

Q. But that is only spasmodically that you have that; is that correct? A. Yes. [40]

Q. At the time of this accident, what was your average monthly earnings?

A. A hundred—about a hundred and twenty-five—\$385 a month.

Q. And during '55 and October, was there a raise granted for the kind of work you were doing?

A. Yes.

Q. So that from October on, what would be your average monthly earnings?

A. \$427, I think it is, a month, about.

Q. Now, during the about 35 years that you worked for this railroad before the accident of February the 6th, 1955, had you ever in the 35 years you worked for this company ever had any accidents before? A. Well, yes.

Q. And when was that; when and what kind of an accident was it; what part of your body was injured?

(Testimony of Frank Reiner.)

A. I had a broken toe, that is, I smashed my toe one time.

Q. And do you remember how long you were laid up with that? A. 27 days.

Q. And you recovered completely from that?

A. Yes.

Q. Now, prior to this accident of February 6, 1955, what was your general condition of health during all the years you worked for this company? [41]

A. I'd say pretty good, fair.

Q. Yes, and other than railroad accidents, were you ever in any other kind of accidents of any kind that you hurt any part of your body, that you can remember?

A. Yes, I—about 1952 I was buck hunting and I had twisted my leg, my knee, and had a—hurt my knee a little bit there in 1952.

Q. Then, at that same time, did you have any trouble with your back at that time?

A. I got—had a kind of a cold settled in my back, and had a little difficulty, lumbago or something.

Q. And you went to the doctor with your knee, did you? A. Yes.

Q. About how long would you say you were off work with your back and knee at that time?

A. About 30 to 40 days, something like that.

Q. And the doctor released you and you went back to work? A. Yes.

Q. And from that time up to the time you were

(Testimony of Frank Reiner.)

injured, had you had any difficulty whatsoever with your back or knee? A. No.

Q. I am just wondering, the railroads have periodical examinations of their men, don't they, by doctors? A. Yes.

Q. And do you recall now whether you had any examinations [42] made—between—after you were released by the company doctor in 1952 or not?

A. I don't recall, but I—it seems as though we did have an examination.

Q. Now, other than those accidents there, and have you had anything else of consequence outside of a cold or anything that took you away from work for any length of time that you can remember? A. No, not that I can recall.

Q. Now, before this accident, will you tell us whether you were able to sleep good at nights?

A. Yes, sir.

Q. And what has been the situation since the accident?

A. Not very good, I sleep very poorly.

Q. How long are you able to sleep at a time?

A. Two—three hours, sometimes not even that much.

Q. And then what happens?

A. I just wake up and lay there.

Q. Now, are you still taking home treatments for your back?

A. I take therapy treatments at the doctor's office.

Q. What doctor is that? A. Dr. Mundal.

(Testimony of Frank Reiner.)

Q. And how many therapy treatments have you had for your back since this accident, approximately? [43]

A. Up in and including January, '57, thirty-six. About thirty-six.

Mr. Rerat: That's all the direct examination at this time.

Cross-Examination

By Mr. Gearin:

Q. Mr. Reiner, you have retired at the present time, haven't you?

Mr. Rerat: That's objected to as incompetent and immaterial.

Mr. Gearin: You have retired on a company retirement——

Mr. Rerat: That's objected to as immaterial, incompetent, and irrelevant—just a minute, please, I have an objection——

Mr. Gearin: I will tie it up, your Honor.

Mr. Rerat: Your Honor, I would like to furnish.

The Court: Is it offered on the issue of damages?

Mr. Gearin: Well, it has to do with some other part about which I may impeach the witness, your Honor.

The Court: Well, if it's offered for impeachment purposes, that's all right, but not if it's offered on the issue of damages.

Mr. Gearin: I am not offering it on that issue of damages at all, your Honor.

(Testimony of Frank Reiner.)

The Court: Well, the jury will understand that whether a man is retired on a pension or not has nothing to do with whether or not he is entitled to recover in a suit such as [44] this. In any event, if you find that he is entitled to recover, this has nothing to do with the amount he is entitled to recover.

Mr. Gearin: I offer it for a limited purpose, your Honor.

Q. (By Mr. Gearin): Now, Mr. Reiner, I understand that you like to hunt, do you? You went hunting in 1952? A. Yes.

Q. All right. Now, since the time of your operation, have you been getting around just like you have been here the last—just today you have difficulty getting around? A. Yes.

Q. All right. Now, on the 3rd of March, or the 11th of March, 1956, did you apply to the Game Commission for a hunting and fishing license, and at that date received License Number 03342?

A. Yes.

Q. All right. And last year you won the employees' salmon fishing derby with a 31-pound salmon, did you not? A. Yes.

Q. And after the case, the other case that we had here last August 1st, when that was not tried, you took your house trailer and went to Lake County deer hunting, didn't you? A. My son.

Q. Yes, you went deer hunting, didn't you? [45]

A. My son.

The Court: The question is, did you?

The Witness: I went with my son, yes.

(Testimony of Frank Reiner.)

Q. (By Mr. Gearin): All right. You have a house trailer at your house? A. Yes.

Q. Do you take that out on little excursions, now and then? A. No, sir, not by myself.

Q. Now, were you hurt when you jumped or were you hurt at the time of the collision between the unit and the other drag of crew 28?

A. That I don't know, when I was hurt.

Q. Now, what doctors have your attorneys had you see for examination? A. Dr. Brown.

Q. Where is Dr. Brown? A. Seattle.

Q. Did you go to Seattle for the purpose of being examined by a doctor in that city?

A. Yes.

Q. And you have been to what other doctors here in Portland? A. Dr. Grossman.

Q. And who else, now? A. Cohen.

Q. Dr. Lawrence Cohen? [46] A. Yes.

Q. And Dr. Robert McMurray? A. Yes.

Q. Have any of those four doctors you have mentioned given you any treatment at all?

A. No.

Q. When were you examined by Dr. McMurray?

A. About three days ago.

Q. And was that for the purpose of testifying at the trial here?

A. Well, to show my condition, I guess.

Q. Now, at the time that Hostler-Helper Moore came into the back unit, Mr. Reiner, did he tell you that they were going back to the yard?

A. No.

(Testimony of Frank Reiner.)

Q. Now, will you agree with me that when railroad men refer to a car length, that they refer to a car which is approximately 50 feet long, or 49 feet?

A. No, sir.

Q. All right, the long cars are called greyhounds, aren't they, and they're 60 feet long?

A. No, I never heard that expression before.

Q. Do you have a recollection now of whether the train was moving or standing at the time you jumped?

A. It was—I was—our—the engine that I was—I [47] jumped from was moving.

Q. Now, as you approached the scene where the accident happened, Mr. Reiner, did you see the light at the switch stand showing red? A. No.

Q. Did you see the light at the switch stand showing green? A. No.

Q. Did you see the switch stand at all, before——

A. No.

Q. Were you looking? A. No.

Q. Now, when you went to see Dr. Carlson, you were referred to him by Dr. Mundal?

A. Yes, sir.

Q. And Dr. Carlson has his office in either the Medical Arts or Medical-Dental Building?

A. Medical Arts.

Q. And does he have an office over at the hospital department where Dr. Mundal is?

A. Not that I know of.

Q. Now, do you say you hurt your back, back in 1952 when you were duck hunting?

(Testimony of Frank Reiner.)

A. No, I didn't.

Q. All right. Have you ever hurt your back before? A. No. [48]

Q. Have you ever worn a back brace before?

A. Yes.

Q. And who prescribed the back brace for you?

A. Dr. Mundal.

Q. And did Dr. Carlson examine your back at that time?

A. I don't recall whether he did or not.

Q. Now Mr. Reiner, did you say that when you got into the cab after you lined the switch and when Mr. Moore, the hostler helper came out there, that it was raining pretty badly and you couldn't see through the windshield? A. Yes.

Q. All right. Now, those cabs are equipped with windshield wipers, one on each side, aren't they?

A. Yes.

Q. Did you turn either one of them on?

A. No.

Q. Did you take any look at all as you were backing up toward the place where the accident took place? A. No.

Q. Do you know where the emergency valve is on those trains? A. Yes.

Q. Did you use the emergency valve to stop?

A. No.

Q. Is there a buzzer to the hostler?

A. Yes. [49]

Q. Did you use the buzzer that night?

A. No.

(Testimony of Frank Reiner.)

Q. Had you used the buzzer on prior occasions?

A. Yes.

Q. Did you tell Mr. Moore to turn the headlight on dim?

A. No.

Q. Did you turn it on bright?

A. Me?

Q. Yes.

A. No.

Q. Were you familiar with the provisions of the Consolidated Code of Operating Rules and General Instructions?

A. Yes.

Q. And when was the last time you had been examined on those, prior to the time of this accident?

A. Just a very short time before.

Q. All right, sir, was the dome light on the cab of the Diesel on as you approached, went back toward the scene of the accident?

A. I can't remember as to whether it was or not.

Q. All right. Now, you were charged with responsibility for this accident——

Mr. Rerat: That's objected to as incompetent and immaterial.

The Court: Did you finish your question? [50]

Mr. Gearin: No, sir; I have not.

The Court: Finish your question.

Q. (By Mr. Gearin): Mr. Reiner, were you charged by the company with responsibility for this accident?

The Court: Objection?

Mr. Rerat: That's objected to, your Honor, as immaterial and irrelevant.

The Court: Sustained in that form. What do you mean, was he accused?

(Testimony of Frank Reiner.)

Mr. Rerat: I am going to object to that as incompetent and not proper impeachment, your Honor, it's incompetent and immaterial impeachment.

The Court: Are you reading to the witness?

Mr. Gearin: I am asking him, your Honor, if that was the conversation. The conversation was gone into, your Honor, on direct examination.

The Court: Overruled; you may answer.

Q. (By Mr. Gearin): Is it not true, that Mr. Moore said, "We might have to go back to the lake"?

A. Not in just them words.

Q. All right. Now, I will ask you if at the hearing to which we have referred on page 51, you were asked these [53] questions, and gave this answer: "Question: Did you have any conversation with Hostler-Helper Moore before the reverse movement was started? Answer: None other than when he came back Moore said, 'Get off the seat back, Frank,' I got away, right away got off and said, 'What is the matter now?' He said, 'We are going to try out something, and we might have to go to the lake,' and at that time I stood in the middle of the cab."

A. Yes.

Q. All right. And when you refer to the lake, you referred to Guilds Lake? A. Yes.

Q. That's where you had been?

A. Yes.

Q. That's where you started out? A. Yes.

Q. And, Mr. Reimer, would it be your duty as a

(Testimony of Frank Reiner.)

pilot herder to protect the rear end of that train?

A. That just depends on where the move was made or what was being done.

Q. Well, at this particular instance, after they stopped on their way in from the lake into the Union Station, when they stopped at that time, would it be your duty to protect the end in case they stopped?

A. No, I had my red lights on there and I had one block [54] system and I had my rear end protected.

Q. All right. Would you refer to page 57 of the transcript of the hearing, please? All right. The fourth question down, please? All right. Were you at that time and at that place asked this question: "Question: Would it be your duty, Mr. Reiner, as a herder to protect that end in case the hostler stopped for some unknown reason? Answer: Yes."

A. Yes, for oncoming trains, yes.

Q. Now, how long had you stopped there before you started the reverse movement?

A. Oh, I couldn't say for sure.

Q. Would you say four or five minutes?

A. Well, I don't recall just down to the minute, I don't recall.

Q. Would it refresh your memory if you referred to the transcript, and I refer to page 50, Mr. Reiner, the fourth question from the bottom?

A. I guess that's about——

Q. "Just four or five minutes, maybe a little less."

(Testimony of Frank Reiner.)

A. I wouldn't swear one way or the other.

Q. Would you say you were about somewhere—12 to 14 car lengths back from where you were stopped until the place where the accident occurred?

A. About 12. [55]

Q. Is it also your duty to protect the movement at crossings?

A. If we was to go through a cross-over, yes.

Q. Now, prior to the time that you had stopped, that's when you started to back up, had you seen the other train with which you ultimately collided?

A. Yes, it was setting on the eastward main line.

Q. Would that be what you call the outbound main line? A. Yes.

Q. All right, sir. Did Mr.—do you remember Mr. Phillips, Don Phillips? A. Yes.

Q. Where was he?

A. He was on the other crew, the other train that was on the other track.

Q. Now Mr. Reiner, do you recall that on February the 19th, three days after the accident, you gave a statement to Mr. Jepson of the terminal company at your home at 2305 Southeast Ellis Street?

A. Yes.

Q. Was that typed out for you, that statement, do you recall? A. Yes, I believe it was.

Q. All right. And was someone else there with Mr. Ellis, I mean with Mr. Jepson? [56]

A. No.

Q. Wasn't Mr. Kanzler there?

(Testimony of Frank Reiner.)

A. Yes, but not when he—he was there afterwards.

Mr. Gearin: All right. And I was wondering if we might have this—this is an exhibit which has not been shown to counsel, your Honor, because it was for impeachment purposes.

The Court: Has it been marked?

The Clerk: No, sir.

The Court: It will be marked, what number would it be?

Mr. Gearin: It would be 26, your Honor.

The Court: 26 for identification.

(Whereupon Defendant's Exhibit Number 26 was marked for identification.)

Mr. Gearin: May it be handed now to the witness, your Honor?

The Court: It may.

Q. (By Mr. Gearin): Mr. Reiner, I am handing you Exhibit Number 26 and I ask you if that's the statement you gave to Mr. Jepson, and I will ask you further if your signature does not appear on each one of the four pages? A. Yes.

Q. And does not Mr. Kanzler's signature appear on each one of the four pages? [57] A. Yes.

Q. And he was the same man that represented you at the hearing on March the 4th?

A. Yes, sir.

Mr. Gearin: We offer Number 26 in evidence, your Honor. I don't think counsel has seen it, however.

(Testimony of Frank Reiner.)

The Court: Do you wish to read it during the afternoon recess?

Mr. Rerat: Yes, your Honor.

The Court: We will take the afternoon recess at this time.

Ladies and Gentlemen, you are excused for five minutes, subject to the usual admonitions. It is stipulated, gentlemen, that the jury may retire from the courtroom?

Mr. Gearin: Yes, sir.

The Court: Will you answer my question to the stipulation so the record will show?

Mr. Rerat: Yes, your Honor.

The Court: Is it stipulated that the jury may retire?

Mr. Rerat: Yes.

(Whereupon, the jury was excused for a recess and the following proceedings were had:)

The Court: Now, have you gentlemen agreed upon what does the record show the age of this plaintiff; have you [58] agreed upon what the life expectancy is going to be on the mortality table?

Mr. Rerat: 59, your Honor——

Mr. Gearin: I have forgotten.

Mr. Rerat: ——at this time.

The Court: He is 59?

Mr. Rerat: 57 at the time of the accident.

Mr. Gearin: Right, that's correct.

The Court: 57.

Mr. Gearin: And your Honor, I would be willing to enter into this stipulation if it's all right with

(Testimony of Frank Reiner.)

counsel, that insofar as any exhibits that may be introduced, written exhibits, that it may be read at any time by any counsel rather than reading it at the time it was introduced. Is that all right?

Mr. Rerat: That's satisfactory.

The Court: You haven't checked the mortality table?

Mr. Rerat: I have checked it, your Honor, it's 14 years, point 74. That's the American experience table, mortality table, that's the lowest, so I don't suppose that there is any objection.

Mr. Gearin: No, sir.

The Court: That is for age 57?

Mr. Rerat: Age 59, your Honor.

The Court: 59. 14 years—— [59]

Mr. Rerat: 14 years, point 74.

The Court: Very well, recess for five minutes.

(A short recess.)

The Court: Is it stipulated, gentlemen, the jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes.

The Court: You may proceed.

Cross-Examination
(Continued)

By Mr. Gearin:

Q. Mr. Reinier, when Hostler-Helper Moore came back to the cab, there was some conversation with him, wasn't there?

A. Just one thing what he said there was, "Get off the seat box."

(Testimony of Frank Reiner.)

Q. And then he pressed the buzzer three times?

A. Yes.

Q. And three times means to back up?

A. Yes.

Q. And what means to stop? A. One.

Q. Then after he pressed it three times is when the backup movement began? A. Yes.

Q. Did you say anything to him after he pressed the button three times? [60]

A. I either said or tried to say, "Hold her," but it was only a matter of seconds before we hit.

Q. Now, after the accident, it was your leg that hurt you, was it not?

A. My leg and back and knee and all hurt.

Q. Didn't your leg—wasn't that hurting you the most that night?

A. Yes, the leg was the worse.

Q. And that's what they X-rayed at the hospital that night? A. That's what that guy X-rayed.

Q. And then a little later on your back started hurting?

A. The pain was so severe in my leg that it was hurting me all over. But it was so severe that you really couldn't tell. I was sore all over.

Q. Well, the next day you experienced pain in your leg and hip and that, you say, was bad?

A. My leg, back, and hip.

Q. All right. Did your back hurt you right away?

A. Yes.

Q. All right. Now, I wonder if the Clerk would

(Testimony of Frank Reiner.)

hand to the witness Exhibit Number 27 which is the plaintiff's adverse-party deposition?

The Court: Has that been opened, Mr. Clerk; is it opened?

The Clerk: Yes, sir. [61]

The Court: The Clerk says this is the deposition taken in connection with some other case.

Mr. Gearin: Yes, your Honor, it's in connection with the cause number 8538 in this court between the same parties.

Mr. Rerat: Well, excuse me, this same case?

Mr. Gearin: Well, yes, just—it involves the same issues.

The Court: Very well, place it in the hands of the witness.

(Document handed to witness.)

Q. (By Mr. Gearin): Will you look at the first question and answer on page 27, please? Do you have that in mind, Mr. Reiner? A. Yes, I have.

Q. And this was a deposition taken May 22nd, last year, at Mr. Lezak's office, and Mr. Larkin of my office was there with Mr. Johnson and Mr. Lezak, your attorney; do you recall the occasion?

A. Yes.

Q. Did you at that time recall being asked this question and giving this answer: "Question: Well, later, did any other part of you hurt? Answer: Oh, yes, my back started hurting. Question: When? Answer: Oh, as time progressed this got better, but

(Testimony of Frank Reiner.)

it was quite a little while until I got this other—got any relief.” Did you so testify? [62]

A. Yes.

Q. All right. And isn't it true that the doctor came out to see you the day after the accident?

A. No.

Q. All right. Will you refer to the second question down from the one to which I just directed your attention? A. The second?

Q. And at that time?

A. Which—where is this?

Q. On page 27. A. Second question?

Q. And you referred then to some notes you had in your possession?

A. Yes. What is the question?

Q. Well, do you remember at that time your deposition was taken you referred to some notes you had about dates and times?

A. Well, I don't recall.

Q. Have you kept a diary of the dates you went to the hospital and saw the doctor?

A. Yes, pretty much.

Mr. Gearin: That's all. I have no further questions.

(Testimony of Frank Reiner.)

Redirect Examination

By Mr. Rerat:

Q. Were you asked this question, Mr. Reiner, in continuing, [63] counsel read part of this in regard to questions about your injuries, and were you asked this question and did you give this answer: "Question: Well, could you tell me first how long after the accident it was that you noticed any back pain? Answer: Well, it was all the time, I had something all over as far as—I was sore all over, all the time from the time of the accident my hip, my back and everything, but that was where it hurt me the worst, was my knee and my leg and my hip and the lower part of my back and my hip." Were you asked that question by an attorney from his office and did you give that answer? A. Yes.

Q. Yes. Now, your Honor, Exhibit 26 was marked and was that offered in evidence or not?

Mr. Gearin: I offered it.

Mr. Rerat: Well, I——

The Court: It was offered before the recess. I have heard nothing about it. We took a recess to give you an opportunity to read it.

Mr. Rerat: Yes, your Honor, and I hadn't considered anything about it when the recess was over, but I have no objection, your Honor.

The Court: Very well.

Mr. Rerat: As far as this exhibit is concerned.

The Court: Now, will you please address your remarks [64] to me? You have no objection?

DONALD E. PHILLIPS

called in behalf of the plaintiff and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name, please?

A. Donald E. Phillips.

Q. Where do you live, Mr. Phillips?

A. 3100 Southeast 144th.

Q. By whom are you employed?

A. Northen Pacific Terminal Company.

Q. How long have you been employed by this railroad company? A. Seven years.

Q. In what capacity? A. Switchman.

Q. Were you working as a railroad switchman on December—or, on the 6th day of February, 1955?

A. Yes, sir.

Q. What time did you go to work on that particular day?

A. It was either 3:00 o'clock or 4:00 o'clock, I am not sure.

Q. Well 3:00—4:00 o'clock, and you would be through at about 11:00 or 11:30 that night?

A. Yes, sir.

Q. Now, about 9:00 o'clock that evening, did you have— [67] were you with a crew that had some cars on the eastbound main line track that was involved later in an accident? A. Yes, sir.

Q. What kind of an engine did you have on that cut of cars that night?

(Testimony of Donald E. Phillips.)

A. Diesel switch engine.

Q. And how many cars did you have attached to the Diesel if you remember?

A. I am not sure, but it was around 30 cars.

Q. Now, was that—was the Diesel and the cars on the east line or on the eastbound main track?

A. Yes, sir.

Q. Now, do you recall that while your—while your cut of cars was standing on that track, do you recall that two engines came up from the north traveling south toward the terminal on the westbound main track?

A. Yes, sir.

Q. Where were you when you first saw them?

A. I was in the Diesel engine.

Q. And do you remember about where the Diesel engine was when you first saw them?

A. The S. P. Diesel?

Q. Yes.

A. Oh, they were approximately at 21st Street.

Q. That would be south of the—or rather, north of the [68] portion shown on Plaintiff's Exhibit 1, which is the exhibit there?

A. Yes, sir.

Q. Well now, your cut of cars would have to remain on the eastbound main track then until the two engines had cleared that crossover that extended from the eastbound main line to the westbound main line?

A. That's right.

Q. As shown in Plaintiff's Exhibit 1?

A. That's right.

Mr. Rerat: Your Honor, we have Dr. McMurray

(Testimony of Donald E. Phillips.)

in court, and I wonder if we could withdraw this witness and place Dr. McMurray on the stand?

Mr. Gearin: That's satisfactory, your Honor.

The Court: You may.

Mr. Rerat: All right, thank you.

(Whereupon, Donald E. Phillips was temporarily excused.) [69]

(Donald E. Phillips resumed the stand on direct examination by Mr. Rerat and was examined and testified further, as follows:)

Mr. Rerat: Let's see, could you tell me about where were were, Mr. Reporter? I don't know.

The Court: Suppose the witness tells you what you were talking about before Mr. Phillips was interrupted.

The Witness: It seem as though he asked me how many cars we had a hold of.

Q. (By Mr. Rerat): Then, how many cars did you have a hold of?

A. I think it was around 30.

Q. About 30. Now, from the eastbound main line track you were going to take what course?

A. Well, we were crossing over to the westbound main-line track.

Q. Now, could you step down to Plaintiff's Exhibit 1, which is an aerial view of the place where the accident happened and show us the course that your engine and cars were going to take or did take from the eastbound main line to the westbound main line?

(Testimony of Donald E. Phillips.)

Now, before you do that, Mr. Phillips, do you understand that exhibit? That is, I mean, the directions and what is shown on there?

A. It is quite confusing. [70]

Q. Well, it's been testified to that the north, or the upper part of the picture is north, the lower part is south.

A. Oh, I see. We were standing right here (indicating).

Q. And what would the course of your movement be then?

A. Right through here (indicating) along this way (indicating).

Q. Yes. Now, the engine, I believe, that you said was on the front end or on the north end?

A. Right here (indicating) yes, our engine.

Q. Your engine? A. Yes.

Q. Then the other cars would be immediately in back of it? A. Yes.

Q. And you said about 35 cars; is that correct?

A. That's right.

Q. Now, what is the average length of a boxcar?

A. Forty feet.

Q. In order for you—or, for the movement of the cut of cars that your engine had a hold of to proceed from the eastbound main track to the westbound main track, would it be necessary for any switches to be made?

A. Oh yes, this one here (indicating) would have to be lined. [71]

Q. And which other one?

(Testimony of Donald E. Phillips.)

A. And this one right here (indicating).

Q. Now, when the switch, the last one you indicated, you pointed to on Plaintiff's Exhibit 1, when that would be lined for the movement from the eastbound to the westbound track, looking at that switch light from the south, that would be what color? A. Red.

Q. And what would that mean?

A. That would indicate that this was lined for the crossover.

Q. And with a red switch, should there be any movement against—on a track where the switch is lined red? A. No.

Q. Now, when your train, or when your cut of cars proceeded across to the westbound main-line track, before all of your 35 cars cleared, was there a collision or an impact? A. Yes.

Q. And where were you when this impact took place? A. I was in the engine.

Q. That is the engine—will you show us approximately about where?

A. Approximately right there (indicating).

Q. That would be south of where the X mark is on Plaintiff's Exhibit 1 on the main-line track; is that right? [72] A. Yes, sir.

Q. Now, when the impact took place, what happened to you?

A. Well, I was hit in the back—

Mr. Gearin: Just a moment, that's entirely immaterial as to the injury, if any, sustained by Mr. Phillips on a different train.

(Testimony of Donald E. Phillips.)

Mr. Rerat: Well, your Honor, I am not going into the injuries. I just—were you injured, actually, answer yes or no?

The Witness: Yes.

The Court: Proceed.

Q. (By Mr. Rerat): Then with the movement stopped, that is, after the impact the movement stopped, what did you do?

A. Well, after a couple of minutes, I got up and went and walked up to 17th Street, which isn't pictured. It would be here (indicating) and called the yardmaster and had them to send an ambulance down to pick up Mr. Reiner.

Q. Now, before that time, had you seen Mr. Frank Reiner?

A. Yes, as I came out of the engine he was right in the ditch right there (indicating).

Q. And will you just describe Mr. Reiner as you saw him on that particular night?

A. Well, he acted as though he was in pain and I was excited, he may have had broken bones, so I was the only one available to leave and call the yardmaster to order an [73] ambulance.

Q. And did you talk to him?

A. Not at that time, no. After I come back from the telephone I did.

Q. Would you give the conversation? I mean, what was said by either one of you, will you just tell how he talked?

A. Well, he didn't talk normal.

Q. Then when you got out of the engine and you

(Testimony of Donald E. Phillips.)

walked back, did you see where the impact had taken place? A. Yes.

Q. And how far behind your engine did this impact take place; where was the point of collision, about?

A. It was either the fifth and sixth cars, or the sixth and seventh cars. I am not positive about it.

Q. And then there was, at the time of the impact then, approximately how much of your train or how much of the cut of cars that your engine had a hold of was on the westbound main track?

A. Our engine, one car and a half.

Q. I see. And during all that time—strike that. I don't know whether I have asked you or not about it; when we speak of switches and switch stands, could you tell us about how high they are?

A. Six feet high.

Q. And will you tell us whether or not at night they are [74] lit, there is a light?

A. They are supposed to be.

Q. Yes. And you have what kind of lights?

A. Kerosene.

Q. I mean, what color? A. Red and green.

Q. And do you know whether or not that light was red as your—as the movement of the cut of cars that you were a member of proceeded across from the eastbound to the westbound and onto the westbound track? A. It was.

Q. It was red? A. Yes.

Q. I don't believe you told us what kind of a

(Testimony of Donald E. Phillips.)

night it was, what have you to say; do you remember?

A. Well, it was drizzly wet.

Q. All right. You may be seated. That's all of the direct examination, your Honor.

Cross-Examination

By Mr. Gearin:

Q. Mr. Phillips, that night, even though it was drizzly, you had no difficulty in distinguishing and being able to observe the lights on the switch stands, did you?

A. I walked up, right up to it.

Q. Well, you could see it though? [75]

A. Oh, yes.

Q. Now, your instructions before you crossed were to wait for the S. P. Diesel to go by, before you started out? A. Yes.

Q. All right. Mr. Reiner did not go away in an ambulance, did he? A. No.

Mr. Gearin: I have no further questions, thank you.

Redirect Examination

By Mr. Rerat:

Q. And did you notice what happened after you got back down, who took him away, or anything?

A. No.

Mr. Rerat: That's all.

The Court: You may step down. We will take the recess at this time until tomorrow morning at 9:30.

(Witness excused.)

(Whereupon, an adjournment was taken until 9:30 a.m. of the following day.) [76]

Tuesday, January 22, 1957, 9:30 A.M.

The Court: In the case on trial, Gentlemen, is it stipulated the Jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: You may proceed.

Mr. Rerat: Your Honor, I was wondering whether yesterday I had introduced in evidence the American Table of Mortality. It has to do with life expectancy.

The Court: You indicated at the close of the session that you expected to ask the Court to take judicial notice of the table, and I believe you said you had looked it up.

Mr. Rerat: Yes, your Honor, and the life expectancy of an individual 59 years of age is 14.74 years.

Mr. Gearin: I have no question about that, your Honor.

The Court: Very well, since you both agree the Court will take judicial notice of that fact.

Mr. Rerat: Your Honor, may we recall Mr. Phillips, please?

The Court: You may.

DONALD E. PHILLIPS

recalled by plaintiff, having been previously sworn, was examined and testified as follows: [77]

Direct Examination

By Mr. Rerat:

Q. Mr. Phillips, I overlooked asking you a couple questions when you were on the stand yesterday afternoon. When your engine and cars moved from the eastbound main-line track to the westbound over the crossover track, from that time it started moving up until the time of the collision what was the approximate speed of the movement of your cut of cars?

A. About two miles an hour, approximately. It couldn't have been over that.

Mr. Phillips, during the time that you have worked for this railway company have you also done the work of a pilot-herder switchman?

A. Yes, sir.

Q. So are you familiar with the duties of that kind of work for this company, this railroad company?

A. Yes.

Q. Mr. Phillips, will you tell us generally, will you tell us what are the duties of a pilot-herder switchman?

A. Well, he is required to couple on and uncouple engines from passenger trains and protect the high shed and cut it when necessary and couple it up when necessary.

Q. Had you finished?

(Testimony of Donald E. Phillips.)

A. I believe that covers everything. [78]

Q. Does the pilot-herder switchman have anything to do with the operation of the engine?

A. None whatsoever.

Q. Does the pilot-herder have anything to do with the operation of the lights in the front or where you have a double unit back-to-back with the operation of the light in front of the engine, putting it on dim or bright?

A. No, sir.

Q. Does he have anything to do with the operation of a windshield wiper in front?

A. No, sir.

Q. Is he able to give instructions—withdraw that—is the fireman under the pilot-herder switchman?

A. No, sir.

Q. Where you have a movement of a unit, a double unit, the units being back-to-back on the main-line track, does the pilot-herder have anything to do with keeping a lookout as far as the track is concerned for any obstacles on the track?

A. No, sir.

Q. Where the movement is made with a double unit back-to-back on the main-line track and the movement stops unbeknown to the pilot-herder and the movement is made in the reverse direction, if the pilot-herder is in the cab of the engine does he have any responsibility, or does he have any duties as far as looking down that track for any obstacles on the track? Do you [79] understand my question?

A. I understand the question, but I don't know just how I want to answer it.

(Testimony of Donald E. Phillips.)

Q. Well, you answer it the way it is right, the correct way.

A. While working for the Terminal Company, no.

Q. Showing you Plaintiff's Exhibit 11 which has been marked, and it has been stipulated, your Honor, that that is an order that was issued by the company under the signature of Mr. Jones (the General Manager, and we offer Plaintiff's Exhibit 11 in evidence.

Mr. Gearin: We have no objection to the identity, your Honor. What that document purports to be is part of a union agreement with respect to part of the duties of a pilot or a pilot-herder.

The Court: What is the identification number of it?

Mr. Rerat: Eleven, your Honor.

The Bailiff: No, it is Exhibit 13.

Mr. Rerat: I am sorry. I thought it was eleven.

The Court: It is stipulated to be an excerpt, I take it from the union contract?

Mr. Rerat: Yes, your Honor.

The Court: Received in evidence.

(Thereupon, the document previously marked Plaintiff's Exhibit 13 for identification, part of union agreement, was received in [80] evidence.

Mr. Rerat: It designates the duties of a pilot-herder.

Mr. Gearin: We object to that, your Honor. It speaks for itself.

Mr. Rerat: Well, yes.

(Testimony of Donald E. Phillips.)

Mr. Gearin: It is not what Counsel says.

Mr. Rerat: Well, it is what I said. It says so.

The Court: The document speaks for itself. You will have plenty of time to argue when the case goes to the jury. Exhibit 13 for identification is received. It is stipulated to be an excerpt from the union contract. What it covers, I suppose the language speaks for itself. You may show it to the witness.

Q. (By Mr. Rerat: Now, Mr. Phillips, did you receive a copy of Exhibit 13?

The Witness: Yes, sir.

Q. What is Exhibit 13?

A. Shall I read it?

Q. Yes, read it.

A. (Reading): "It is the Company's position that a Pilot's duties also properly include the following:

"1. The coupling and/or the uncoupling of cars on passenger trains at the crossings in depot passenger train yard.

"2. The coupling and/or uncoupling of road engines of passenger trains in the depot passenger yard. [81]

"It is also the Company's position that giving the necessary signals for passenger trains to proceed when they are to leave the depot passenger yard when loading of passengers, mail, express, etc., has been completed and likewise governing the movement of passenger trains within the depot yard tracks to discharge the aforementioned traffic and

(Testimony of Donald E. Phillips.)

to pull over passenger, foot, or truck crossings is Stationmaster's work."

Mr. Rerat: I think that is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Phillips, you did not have a passenger train, did you, at the time of this accident?

A. No.

Q. A passenger train was not involved in the movement of the two diesel units? A. No.

Q. Will you agree with me that a pilot-herder gets more money than a herder?

A. I don't know.

Q. Are you familiar with the provisions of Rule 106 of the Consolidated Code of Operating Rules, Mr. Phillips?

A. I probably am but not under that name.

Q. Are you familiar with the provisions of Rule 108 of the same set of rules?

A. I have read it.

Q. Thank you. I have no further questions.

The Court: You may step down.

(Witness excused.) [82]

JOHN F. LEAP

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. John Franklin Leap.

Q. Where do you live, Mr. Leap?

A. 6015 Northeast 28th Avenue.

Q. How long have you lived in Portland, Oregon? A. Twenty-one years.

Q. Are you a married man? A. Yes, sir.

Q. By whom are you employed?

A. Northern Pacific Terminal Company.

Q. How long have you been employed by that railroad company?

A. Nineteen years and eleven months.

Q. You are still working for that company?

A. Yes, sir.

Q. During the time that you have worked for this railroad company have you worked as a switchman and as a pilot-herder switchman?

A. Yes, sir.

Q. Will you tell us what are the qualifications of a pilot-herder? [83]

A. He shall be a qualified engine fireman to assume the duties of a pilot-herder.

Q. In other words, a fireman is qualified as a pilot-herder; is that correct? A. Yes, sir.

Q. With this company. Now during the years

(Testimony of John F. Leap.)

that you have worked for this company have you had occasion to work as a pilot-herder switchman?

A. Yes, sir.

Q. About how much of the time have you worked as such? A. About six months, I would say.

Q. When working as a pilot-herder, have you had occasions to take double units diesels from the Northern Pacific Terminal to the Guilds Lake Yards? A. Yes, sir.

Q. Are you familiar with the duties of a pilot-herder? A. Yes, sir.

Q. Mr. Leap, will you tell us in a general way what are the duties of a pilot-herder?

A. He has to uncouple the cars, the passenger train cars, at the height shed and couple them if necessary, to uncouple the road engines from the trains and to couple them to the trains.

Q. Does the pilot-herder travel with the engine from the Terminal station to the Guilds Lake [84] Yards? A. In some cases.

Q. In some cases?

A. Sometimes; yes, sir.

Q. Does the pilot-herder have anything whatsoever to do with the operation of the engine?

A. None whatsoever.

Q. Does he have anything to do with the putting on of a headlight, either dim or bright?

A. No, sir.

Q. Or does he have anything to do with the operation of a windshield wiper on the engine, or does he have anything to do with the working of

(Testimony of John F. Leap.)

any of the other valves such as an emergency brake or anything else connected with the engine?

A. No, sir.

Q. When an engine is operated, in the front cab there is a fireman and an engineer?

A. Yes, sir.

Q. When that engine is being operated in, well, first take the forward movement on a main-line track. Does the pilot-herder have anything to do with keeping a lookout on that track for obstructions on the track?

A. No, we are alert at all times, but that is not our duties to see that there is—that is the engineer and the fireman's duties.

Q. Does the pilot-herder have any duty of opening the cab, [85] the windows in a cab, so that the fireman or the engineer can have a better, get better vision of what is in front or in back of the engine?

A. No, sir.

Q. When a movement is being made on the main-line track and with a double unit and the unit stops and there is a reversed movement made on the main-line track, does the pilot-herder have anything to do as far as keeping a lookout for obstructions on the track?

A. To the rear or to the front?

Q. Yes, if the movement is being that way?

A. No.

Q. He does not. Does he have anything to do with any of the mechanism as far as the locomotive engine is concerned?

A. No, sir.

Mr. Rerat: That is all.

(Testimony of John F. Leap.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Leap, you say that the pilot-herder is all the same as a qualified engine-fireman?

A. Yes, sir.

Q. His rate of pay then, of course, is higher than that of an ordinary herder?

A. Would you define a herder for me, sir? I mean a pilot-switchman herder I understand is the same qualifications. [86]

Q. What is a pilot-herder?

A. You are asking me what the pilot-herder or is it just anyone a herder?

Q. So that we can define our terms, what is a pilot-herder?

A. A pilot-herder is a classification of a workman for, in this case, the Terminal Company, that pilots or herds the engines.

Q. You say a pilot-herder pilots the engines. Is that different than a pilot-herder switchman?

A. Might I ask you, are we getting these terms, I mean aren't you putting in different terms all the time there?

Q. The point is did you refer to the term of pilot-herder switchman in your direct examination in answering questions by Mr. Rerat?

A. Yes.

Q. All right, will you define that term for us?

A. You mean what is meant by it?

(Testimony of John F. Leap.)

Q. Yes, what did you mean by it?

A. A pilot-herder switchman is a man that couples the passenger engines and uncouples them. He couples the engines on to the passenger trains and uncouples them.

Q. What do you mean by a pilot-herder, the same thing or something different?

A. It would be the same thing.

Q. He is the one that pilots the engine? [87]

A. Yes, sir.

The Court: In other words, when you speak of a pilot-herder you speak of a pilot-herder switchman. You are talking about the same thing; is that it?

The Witness: Yes, sir.

Q. (By Mr. Gearin): Is it the duty of one who pilots an engine to keep a lookout for anything that might happen?

A. I have already stated that we are supposed to be alert?

Q. Is it the duty of a pilot to take a safe course?

A. Always.

Q. That is Rule 108, isn't it? All right, sir, is it the duty of the pilot-herder to protect the crossings?

A. Public crossings, public grade crossings or foot crossings at the depot that——

Q. Let's say crossings other than foot crossings at the depot.

A. There is a high shed crossing that we will look out for.

(Testimony of John F. Leap.)

Q. Is it your duty to protect the rear end?

A. No.

Q. Are you familiar with the provisions of Rule 106? A. Yes.

Mr. Gearin: I wonder if we could have the clerk or bailiff hand to the witness Defendant's Exhibit No. 21.

(Document presented to the witness.)

The Court: Is that in evidence yet, counsel? [88]

Mr. Gearin: No, sir. We will offer it in evidence, your Honor.

The Court: Is it stipulated to be genuine?

Mr. Rerat: Yes, your Honor, it is. No objection.

The Court: A copy of the rules?

Mr. Gearin: Yes, sir.

The Court: Exhibit 21 is received in evidence. Received.

(Thereupon, the document, copy of rules above referred to, previously marked Defendant's Exhibit 21 for Identification, was received in evidence.)

Q. (By Mr. Gearin): Will you read Rule 106?

The Court: To himself or out loud?

Mr. Gearin: Out loud, please.

The Witness: "The conductor and the engineer and pilot, when there is one, are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules must take every precaution for protection."

(Testimony of John F. Leap.)

Mr. Gearin: Thank you, sir. I have no further questions.

Redirect Examination

By Mr. Rerat:

Q. Just one question. If you have just two engines, is that a train, considered a train where you just have two engines [89] running a unit together?

A. Might read the definition of a train?

Q. Yes, if it is there.

A. First I will read a definition of an engine. "An engine is a unit propelled by any form of energy for use in train or yard service." "A train is an engine or more than one engine coupled with or without cars displaying markers."

Mr. Rerat: Thank you. I have no further questions.

The Court: Would you read that again? I don't think I understood it. You say with or without cars?

The Witness: Yes, sir—the train, sir?

The Court: Yes.

The Witness: A train is an engine or more than one engine coupled with or without cars displaying markers.

The Court: Two engines coupled together displaying markers would be a train?

The Witness: Displaying markers would be a train.

The Court: What are markers?

The Witness: That's flags or lights, you see, on

the front of the train indicating, or, they are white or green.

The Court: Anything further, gentlemen?

Mr. Gearin: No, sir.

The Court: You may step down.

(Witness excused.) [90]

WILLIAM ROBERT McMURRAY

was thereupon produced as a witness in behalf of the plaintiff, and, having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. William Robert McMurray.

Q. What is your profession?

A. I am a physician and surgeon.

Q. What school are you a graduate of?

A. University of Oregon Medical School.

Q. What year? A. 1943.

Q. And you are duly licensed to practice medicine in the State of Oregon? A. Yes, I am.

Q. Where are your offices located, doctor?

A. 919 Southwest Taylor Street.

Q. Since your graduation from medical school up to the present time, will you tell us just what your learning and experience has been in your profession?

A. Well, after graduation from medical school, I interned at Brooklyn, New York, at the Long

(Testimony of William Robert McMurray.)
Island College Hospital [1*] for a nine-month period, then I was in the military service as a naval doctor for two years, then I returned from the service and I spent eighteen months as a general resident and in general surgery in Providence Hospital here in Portland. I then spent a year in the University of Oregon Medical School, again as a resident in general surgery. After that I went to the University of Iowa from 1949 through 1952 where I took further training in orthopedic surgery and I have practiced six months in Yakima, Washington, prior to returning to Portland, Oregon, where I have been since then.

Q. Now, doctor, you have stated that you specialized in orthopedic surgery. Will you tell us what is meant by orthopedic surgery?

A. It is the specialty of dealing primarily with afflictions of bones and joints.

Q. Doctor, are you on the staff of any hospitals in Portland, Oregon, here?

A. Yes, I am on the staff of St. Vincent's Hospital and the staff of Providence Hospital in Portland.

Q. And are you connected with the University here in any capacity?

A. Yes, I am. I am the clinical instructor at the University of Oregon Medical School in Orthopedic Surgery.

Q. How long, doctor, have you taught orthopedic surgery at the University? [2]

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

(Testimony of William Robert McMurray.)

A. Approximately three years.

Q. And are you a member of the various medical societies, doctor, if so, will you name them?

A. Well, I am a member of the Multnomah County Medical Society; the Oregon State Medical Society; the Western Orthopedic Society and the American Medical Association.

Q. Now, doctor, at the request of Mr. Lezak, Bailey, Lezak and—or Bailey & Lezak firm, did you make an examination of the plaintiff in this case, Mr. Frank Reiner? A. Yes, I did.

Q. Now, was that made for the purpose of determining what injuries he was suffering from so that if necessary you could come into court and explain to the court what injuries Mr. Reiner was suffering from at this time and what the future holds for him?

Mr. Gearin: I object to the form of the question.
The Court: Sustained.

Q. (By Mr. Rerat): Well, when was this examination made?

A. January 15th of this year.

Q. Now, doctor, will you tell us just what the extent was of your physical examination of him was; just what your observations were; just what tests were, if any, were made by you and just what the results were of those tests and what your conclusions were as to what injuries, if any, [3] you found him suffering from after your examination?

A. Physical examination? *

(Testimony of William Robert McMurray.)

Q. Yes.

A. Physical examination. All right. The patient was ambulant without difficulty. He walks well on his toes and on his heels. He gets in and out of a chair jerkily and complains of pain in his low back. As regard to his back, there is a spinal fusion scar between L-4 and the sacrum, and a scar over the posterior left ilium. That's over the left hip. In the back at the donor site, the donor site is where the bone is taken for the original fusion. The scar is well healed. There is no drainage. There is some tenderness of the superior portion of the scar over the spinous process of L-3, the third lumbar vertebra. On forward bending, forward flexion, he gets his fingertips to within 8 inches of the ground. Backward bending is absent beyond neutral. Bending to the right and bending to the left are limited approximately 10 to 20 degrees and there is no gross motion in the fused area. There is no spasm in the lumbar musculature, that's the muscles, either in the prone or the standing position. There is some scoliosis, that is bending of the spine, of the lumbar spine to the right with some rotation of the spine. With the patient in the prone position, the instability test at the lumbosacral fusion site is positive. I will have to explain that. With [4] the patient lying face down, pressure on this man's back at the site of the fusion when he is in a relaxed position produced pain. But with the patient laying with his head hanging over the edge of the bed,

(Testimony of William Robert McMurray.)

then the pain was less on pressing down. That's the positive instability test.

Lower extremities, leg lengths, are equal. The thighs measure 19 inches in circumference around the leg at a point 4 inches above the kneecap. 5 inches below the kneecap, the right calf measures 15 and 5/8ths inches and the left measured 15 and 1/4th inches. The left is 3/8th of an inch smaller around at the calf.

Q. Doctor, may I just interrupt you just a minute there. Did that have any significance, the difference between the two calves?

A. It could have some significance.

Q. What is the significance?

Mr. Gearin: Well, we object to the form of the question, your Honor, on the ground that it's not what could be, it's what is the difficulty.

Mr. Rerat. What is the significance as far as the doctor is concerned?

Mr. Gearin: We object, your Honor, the witness has already answered it. He said it could only have some significance. If it has, the doctor may so testify.

Q. (By Mr. Rerat): I will withdraw the question for the [5] time being, doctor. Will you just go on?

A. Straight leg raising test, that is with the patient lying on his back with his legs straight out is 50 degrees from the horizontal bilaterally with pain at the fusion site in his back. The second sign was negative. Now, the second sign is with the leg

(Testimony of William Robert McMurray.)

all the way up and the foot then pulled back toward the thigh. It's effective. It did not produce any pain in either his leg or his back. Other hip motions are essentially normal. Patrick's test is questionably positive on the left. That is a test to the hip joints, and it consists of putting your heel in the opposite knee and rolling the leg and if there is hip trouble you will usually have some difficulty. The knee and ankle reflexes are physiological. Babinski is negative. Motor power of the lower extremities appears normal.

I felt his movement in his lower legs was essentially normal. I found no evidence of any paralysis. There is no weakness of either great toe on dorsiflexion. That is pulling the foot this way (indicating). He walks well on his toes and heels. Patient is able to perceive a difference between the sensation of a pin being sharp and that was what you would call normal and a light touch with cotton which I found was also normal.

Knees, there is normal range of motion in both knees. There is minimal crepitus, that is grinding within [6] the knee, but there is some essentially normal clicking. There is no effusion. That is no fluid within the joint. There is slight medial instability. That's instability on the inside aspects of the knee in both the right and the left. The ligaments of the knee were intact. I did not find any locking in of the knees in going through the various tests.

Q. Now, doctor, there is a chart, an anatomy

(Testimony of William Robert McMurray.)

chart on the other side of that, of the board there. I wonder if you would just bring that out so the doctor could see it?

Mr. Gearin: Well, your Honor, we have no objection to the identity of the exhibit which is now proffered, but I would object to its use unless Dr. McMurray feels it's necessary in order to explain his testimony to use the medical chart.

The Witness: Is it up to me to answer?

The Court: What would you advise?

The Witness: I would say that it is not absolutely necessary but it would be some help in describing the area. I think it would help localize the area involved.

The Court: Very well, bring out the chart. Has that chart been marked as an exhibit?

Mr. Rerat: Yes, sir, that's marked, your Honor, as Plaintiff's Exhibit 10.

Mr. Gearin: May I ask that it be received in evidence [7] then if it's going to be used?

Mr. Rerat: Fine, we have no objection.

The Court: All right, Plaintiff's Exhibit 10 for identification is admitted.

(Whereupon, Plaintiff's Exhibit 10, having been previously marked for identification, was received in evidence.)

Mr. Rerat: Now, Dr. McMurray, will you explain the human spine to us, please?

Mr. Gearin: Well, now, we would object to that, your Honor. There is only testimony of injury to

(Testimony of William Robert McMurray.)

the low back, and I think it would be highly improper to have the doctor testify with respect to the other parts of the body.

The Court: Sustained. This case is taking more time than we figured. Confine your testimony to the part of the body that is involved in this case.

Q. (By Mr. Rerat): Yes, sir. Now, will you just explain the lower part of the back, doctor, that I believe you sometime refer to as the lumbar region?

A. Yes, this is a front on view and that is the lumbar vertebrae, the first, second, third, fourth and fifth lumbar vertebrae. This being the low back, this being the sacrum to the back part of the ring of the pelvis. From the side this is again the sacrum, this is the fifth and so on back up to the first. This white portion between the [8] fifth and the fourth vertebrae is a gristle or a shock absorber which is between each of these vertebrae in this area.

Q. Now, doctor, the number one vertebra is located where in the lumbar region?

A. This is the third, second, first, it would be right here (indicating).

Q. And there are how many lumbar vertebrae?

A. Five in the normal spine.

Q. Then the white space between the boney substances are called what?

A. Intervertebral disks.

Q. And what is the purpose and function of an intervertebral disk?

(Testimony of William Robert McMurray.)

A. Well, I think I can best liken it to a shock absorber. In other words, if you have bone piled on bone and step off of a step, it would be very, very jarring, but this is a shock absorber in the human body which takes up the shock between the bones and the stresses and strains that are put on the back.

Q. Now, doctor——

A. It's a path of cartilage in there between them.

Q. Now, doctor, where did you find the incision in the back?

A. Well, let's see, it is a picture from the back. There is two, one extending over the, say between here (indicating) [9] and here right in the mid-line and there is one at the side that the bone was taken from, the bone for the spinal fusion that this man had was taken from the left hip bone which is called the ilium. It was taken in here (indicating) right in here (indicating). It was taken from here (indicating) and put in here (indicating).

Q. All right. Doctor, will you be seated there?

Mr. Gearin: Are you through with the chart, counsel?

Mr. Rerat: Pardon?

Mr. Gearin: Is the doctor through with the chart, may I ask?

Mr. Rerat: Well, just for the time being, yes. Would you put it back, please?

The Court: You may just move the stand, Mr. Bailiff, and we will proceed.

(Testimony of William Robert McMurray.)

Q. (By Mr. Rerat): Now, doctor, I'd like to call your attention to the hospital records of the Good Samaritan Hospital that were offered and, oh—I don't believe they were, they have been offered yet, but I would like to offer the hospital records and the X-rays.

Mr. Gearin: I have never seen them, your Honor. I would like the opportunity of at least going over them. I didn't even know they were here.

Mr. Rerat: Well, the Clerk told me they were.

The Court: Now, just a moment. Have they been marked [10] as exhibits?

The Clerk: Yes, sir.

The Court: All right.

The Clerk: The hospital records are Exhibit 7 and the X-rays are 6. The X-rays have been subdivided into A, B and C.

The Court: Hand them to counsel for the defendant.

Mr. Rerat: The numbers are what?

The Clerk: Six and 7.

The Court: Is there any objection?

Mr. Gearin: We have no objection.

The Court: It is stipulated that these are hospital records of the plaintiff. Is that agreed? It is the hospital record of the plaintiff, Mr. Gearin?

Mr. Gearin: On counsel's representation that is. I have no objection to it being received in evidence.

The Court: Exhibit 7 for identification received in evidence.

(Testimony of William Robert McMurray.)

(Whereupon, Plaintiff's Exhibit No. 7, having been previously marked for identification, was received in evidence.)

Mr. Rerat: Your Honor, Exhibit 6?

The Court: What about the X-rays?

Mr. Gearin: Same thing applies, your Honor.

The Court: Exhibit 6 for identification is received [11] in evidence pursuant to stipulation.

(Whereupon, Plaintiff's Exhibit No. 6, having been previously marked for identification, was received in evidence.)

Q. (By Mr. Rerat): Now, doctor, will you just examine Exhibits 6 and 7, please, which are the hospital records?

(Documents handed to the witness.)

The Court: We will need a view box.

Mr. Rerat: Your Honor, there are some X-rays that the doctor took. If it's agreeable that they be marked and introduced, he just brought them here.

Mr. Gearin: I have no objection if I am afforded the same courtesies with our doctor.

Mr. Rerat: Well, you will be afforded the same courtesies.

The Court: Have these been marked, these X-rays?

Mr. Rerat: They just come in with the doctor.

The Court: They may be marked for identification. Hand them to the Clerk to be marked for identification. What exhibits are they, Mr. Clerk?

(Testimony of William Robert McMurray.)

The Clerk: We can continue these as 6. We have those other X-rays marked 6.

Mr. Rerat: I would rather have them marked another number if we may.

The Clerk: Eleven is the exhibit number. [12]

(Whereupon, X-rays were marked Plaintiff's Exhibit No. 11 for identification.)

The Court: They will be marked Exhibit 11-A, B, C and so forth depending on the number.

The Witness: There are quite a few. That's upside down, but that's the chest. Did you want me to say anything about these?

Q. (By Mr. Rerat): Well, doctor, what I would like to have done first, they are marking the X-rays that you took, and I would like, as soon as they are marked, like to have you interpret them for the benefit of the Court.

A. I'd better say one thing about those two X-rays, your Honor. One set which I had taken and there is another set which accompanied the patient to my office which were taken previously to mine.

The Court: Does the date appear on them?

The Witness: Yes.

The Court: Have you brought them all together?

The Witness: There are two envelopes.

The Court: Do you have them, Mr. Clerk?

The Witness: They are the loose ones in the large envelope and those belong——

Mr. Gearin: Your Honor, I would have to ob-

(Testimony of William Robert McMurray.)

ject to any X-rays that weren't taken by Dr. McMurray.

The Court: Very well, let's segregate them, Mr. Clerk, [13] which were taken by you and which were not.

The Witness: The small ones were taken at my direction.

The Court: The small ones?

The Witness: Yes.

The Court: All right, take the large ones and mark them 11-A.

Mr. Lezak: Those are the only ones we are considering, your Honor, the ones that were taken by Dr. McMurray.

The Court: The small ones will be marked Exhibit 12-A and so forth.

The Witness: These are the ones I had taken. These are the ones to be admitted in evidence.

The Court: How many are there, doctor?

The Witness: I didn't count them, your Honor.

The Court: Well, the doctor doesn't need to count them. The Clerk can count them.

The Witness: Six.

The Court: Let's get them marked so we can move on. Mark them, Mr. Clerk, the small ones here immediately so the doctor can begin, and as you mark them one by one, hand them to the Bailiff so he can submit them to the doctor.

Mr. Rerat: How many X-rays are there, Mr. Clerk?

The Clerk: Six.

(Testimony of William Robert McMurray.)

The Witness: This is marked Exhibit 12-A. This is on Mr. Frank Reiner taken on December 19th, 1957. [14]

The Court: I suggest if you're going to show it to the jury, you stand over to the right a little way so it will take the light out of the jury's eyes. Mr. Bailiff, will you assist the doctor there?

The Witness: Do you want me to read them off?

The Court: Whatever your counsel wishes.

The Witness: This is 12-B, the same man, the same date.

Q. (By Mr. Rerat): Now, doctor, will you interpret them for the benefit of the Court and jury, please?

A. Yes, I will. This is again the lumbar spine. Plaintiff's Exhibit 12-B. This is 12-B. This is a side view of the lumbar spine taken this way (indicating). This is the fifth lumbar vertebra (indicating). This is the fourth, third and so on. This is the intervertebral space between the first lumbar vertebra and the sacrum, this being the sacrum, this being the intervertebral disk. This is narrow as compared with the other intervertebral spaces. This man has had a spinal fusion from this portion of his sacrum, the second sacral segment including the back or posterior part of the fifth lumbar vertebra. It is impossible to say for sure from the X-rays whether or not there is involvement of the fourth lumbar vertebra, this being a spinous process in the back, it is impossible to interpret from these X-rays

(Testimony of William Robert McMurray.)

whether or not there is fusion involving this. But there has been a [15] fusion definitely from the fifth lumbar vertebra to the sacrum. May I see some more films, please? This is 12-C. This is a film taken bending forward. I might as well identify those all and get it over with, then I can go on. This is 12-D, again another view, same view. This is 12-E, this is an X-ray. These were shots taken for the specific purpose of showing this area (indicating). It shows the entire spine, the entire lumbar spine and 12-F. This is the front on view as I told you in the diagram. That is the sacrum, that is the lumbar spine, that is the fifth lumbar vertebra. The area of the fusion is here (indicating).

Q. Now, Doctor, when you speak of a fusion, will you tell us just what is meant by a fusion and where the fusion appears on the exhibits that you have been showing us?

A. What is meant by a fusion, spinal fusion consists of stiffening two or more bones. This is stiffening between this bone (indicating) and this bone (indicating). This is a spinal fusion within the fifth lumbar vertebra and the sacrum. The purpose being to make this segment of the spine immobile.

The Court: You are referring to Exhibit 12-F, are you, Doctor?

The Witness: Well, this happens to be 12-C, your Honor, and this one happens to be 12-B. These particular films were [16] taken with the patient in forward flexion and the other with the patient bend-

(Testimony of William Robert McMurray.)

ing backward to ascertain whether there is any motion. Whether this fusion is a fusion or whether there is motion. This is not a solid fusion. There is absorption of the bone graft. The bone for the bone graft is taken through the second incision over the back of the left hip, that bone is taken in the form of small chips and laid in there and then it is allowed to unite into the back and produce the fusion. In this case there is absorption, as you see here (indicating) there appears to be absorption of some of the bone graft. This was taken with the patient bending forward. This is 12-B. This is 12-C (indicating), taken with the patient bending his back, and this one is bending forward and shows with the patient bending, with these two exhibits that at the site of the fusion that this is opened up here (indicating), and this is closed (indicating). There is motion at the fusion site.

Q. Doctor, may I just ask you this question: Where was the—what is the significance of that that you told us about, the movement there at the site of the fusion?

A. Well, the significance is this man, I have reviewed, I have seen the hospital charts, the diagnosis on the hospital chart, the reason for doing the fusion in the operating doctor's opening was for an unstable low back. The purpose in doing a fusion is to produce stability in the area and [17] this is not, this is not stable at the fusion site. He has motion on X-rays.

(Testimony of William Robert McMurray.)

The Court: Are you finished with the light, Doctor, please turn it out?

Q. (By Mr. Rerat): All right, Doctor, will you take the stand now? Doctor, it's been testified to here that Mr. Frank Reiner, the plaintiff, is a man—was a man fifty-seven years of age; that he worked for the railroad company, the Northern Pacific Terminal Company, and as a pilot herder switchman that on February 6, 1955, while he was working for this company there was a collision between a two-Diesel unit that he was on and a string of boxcars and that at the time of the impact he was thrown about the cab, first frontward, backward and then side to side and that he was dazed and that while the movement of the Diesel engine that he was on was still in progress, that he jumped out from the Diesel engine to the side and that as a result of being—as a result of what happened in the cab and his jumping, that he received an injury to his left leg and knee and his right knee and also to his left hip and back and he had pain immediately in those places. After the accident, most of the pain was in the left leg and hip. He was taken to the hospital, was there for several hours and then taken home and he remained home for quite some time and he had continuous pain and he was treated by a [18] doctor and he had hot packs put on his leg and hot applications on his back by his wife; that on March the 31st that he was taken to the hospital, the Good Samaritan Hospital, and for about fourteen or

(Testimony of William Robert McMurray.)

fifteen days he was under—he was in traction on both legs and he remained in traction for fourteen or fifteen days at the Good Samaritan Hospital, but the pain persisted and then in June of 1955 he attempted to work for a couple of weeks under difficulty; when he finished work, he would go home and go to bed. He had constant pain in his back and his left leg all this time. I believe then in October of 1955 he was taken to the hospital, the Good Samaritan Hospital, again, and a fusion operation was done by Dr. Mundal and Dr. Carlson. Now, Doctor, assuming, and then that he has had, after that he was in the hospital for about twenty some days; that he had a back brace put on, or, rather, a sold plaster of paris cast at that time which was on until some time in January of 1956 and when that was taken off and then he was given a metal brace. He has had pain in the back since the accident up to the present time and down the left leg and he says the pain is worse sometimes than other times. Now, Doctor, he also testified that in 1952 while he was hunting he twisted his left knee and also he got cold and his back bothered him for a period of about thirty or forty days. I think he was out of work during that period of time. He was released by the doctor and [19] from 1952 up until the time of this accident he didn't have any trouble of any kind with his back. He took an examination by the company doctor during that period of time in the past, and then assuming that testimony to be true,

(Testimony of William Robert McMurray.)

Doctor, and also the fact that prior to '52 he had an injury to his left toe which he was out about twenty some days from work and other than a cold or slight backache he had no trouble with his back except the instance that I speak of or the instances that I speak of 1952; and then in this accident of February 6, 1955. Now, Doctor, assuming that testimony to be true, and taking into consideration the hospital records that you have seen, that are in evidence here, and taking into consideration, Doctor, the examinations that you have made of Mr. Reiner and the X-rays that you took that have been received in evidence together with your medical learning and experience as an orthopedic surgeon, Doctor, have you an opinion as to whether the accident that he was in on February 6th, 1955, is the cause of his present disability that he is suffering from, have you an opinion, Doctor?

A. Yes; assuming that everything——

The Court: You have answered it. Did you have an opinion?

The Witness: Yes; I have an opinion.

Q. (By Mr. Rerat): And what is your opinion, Doctor?

A. Well, my opinion is, that assuming that all the history is as written, that the accident of—whenever it was, I [20] think is was '55——

Q. February the 6th.

A. ——would be the cause of his present troubles, yes.

(Testimony of William Robert McMurray.)

Q. Doctor, assuming the same facts, without going into all the facts that I went into before, I imagine you have them in mind, to be true, have you an opinion, Doctor, as to whether the accident of February 6, 1955, was the cause for the fusion operation that was done in October of 1955?

A. Yes.

Q. And what is your opinion, Doctor?

A. I think that was the cause of it.

Q. Now, Doctor, such a condition that you found Mr. Reiner suffering from, from your physical examinations, also from the X-rays that you had taken of his back, is such a condition, Doctor, you found him suffering from the painful nature—strike that. Doctor, is such a condition that you found him suffering from a cause for pain?

A. Yes; it is.

Q. And will you just explain that to the Court and jury, please?

A. Well, this man has had a spinal fusion. He has motion in the spinal fusion. In reviewing the X-rays, it appears to me that the spinal fusion is impinging, actually on the fifth lumbar vertebra, but I believe this man's fusion is impinging on the fourth lumbar vertebra which is not actually [21] incorporated in the spinal fusion. I believe there is pain at that site. I believe there is pain also from the lack of the spinal fusion. There is motion in that area at the present time.

Q. Now, take into consideration—considering

(Testimony of William Robert McMurray.)

your examinations of this man and the condition that you find him in at this time, have you an opinion as to whether or not he is permanently and totally disabled from doing the work of a railroad switchman or a pilot herder, which is some light work and heavy work on the railroad?

A. Yes; I have an opinion.

Q. What is your opinion, Doctor?

A. I don't think this man, with his back in the present condition it is now, is fit for heavy work.

Q. And, Doctor, have you an opinion as to the pain that he has been suffering from since the time of the accident up to the present time is of a permanent nature? A. Yes.

Q. What is your opinion?

A. Yes; I have an opinion. This is a permanent situation.

Mr. Rerat: You may cross-examine, counsel.

Cross-Examination

By Mr. Gearin:

Q. Dr. McMurray, you gave an opinion based upon the hypothetical question, did you not? [22]

A. Yes.

Q. And you accepted some facts as being true?

A. Yes.

Q. All right. And that's what you base your opinion upon? A. Yes.

Q. Did you also take a history from this man?

A. Yes, I did.

Q. Did he tell you that he had worn a back brace as early as 1952?

(Testimony of William Robert McMurray.)

A. No, he did not tell me that.

Q. Did you ask him about prior back trouble?

A. Yes, I did.

Q. And what did he tell you about prior back trouble?

A. I want to review my record if I may, please.

(Documents handed to the witness.)

The Witness: For two years prior to February 6, 1955, he had experienced occasional low back pain which had been diagnosed as lumbago. He had been told he had arthritis in his spine. His back never had bothered him so that he was forced to lay off work. However, he had lost some time as a result of a previous knee injury. I am not——

Q. (By Mr. Gearin): Doctor——

A. I am not quite through with his early life. I have a little bit more here, I think. As I understand it, he complained of lumbago for approximately a month in '52, [23] and in regard to his back injury he had been released from the doctor's care.

Q. Now, doctor, we know from the hospital records that Mr. Reiner had an unstable fifth lumbar vertebra. Is that accompanied by pain to the low back?

A. It usually is, yes.

Q. And that's right in here (indicating)?

A. Yes.

Q. All right. And that's where some people say they've got lumbago situated in there too?

(Testimony of William Robert McMurray.)

A. Yes, that's right.

Q. All right. Now, you asked him about that, didn't you?

A. What do you mean?

Q. How his back had been bothering him?

A. Yes. In other words, I took a history from him.

Q. Why did you do that, doctor?

A. Well, we do that on every patient. You take a history from everybody who comes in; usually to get the information you must find out what the man's complaints are. The past history is taken for purposes of determining the complaints and to ultimately form your final opinion. The other things are mainly to make a determination. I mean it's part of what we do normally.

Q. Perhaps you misunderstood me, Dr. McMurray, I asked you specifically why did you ask Mr. Reiner if he had any [24] back trouble to his back before?

A. I was dealing with a back problem.

Q. Now, when you have an unstable fifth lumbar vertebra, that means it doesn't sit very well on each other, doesn't it?

A. That's right.

Q. Now, that condition may be congenital?

A. Yes.

Q. That means the person is born with it?

A. Yes.

Q. Or it may be the result of injury?

A. Yes.

Q. And it may be the result of a heavy, violent sneeze?

(Testimony of William Robert McMurray.)

A. Oh, usually there would be a predisposing cause for just that much injury.

Q. A person can get it by lifting something heavy? A. Yes, that's true.

Q. And one of the standard means of treating an unstable fifth lumbar vertebra is to put a person in a back brace? A. Yes.

Q. All right. And did you feel that he had an unstable fifth lumbar vertebra prior to the accident in February of 1955?

A. I could have no opinion on that because I didn't see this man until January of this year.

Q. All right, sir. Now, when you say you mentioned something [25] before, doctor, about no spasm, now, as I understand it, spasm is nature's way of muscle protection against pain?

A. That's true.

Q. And you said Mr. Reiner could touch 8 inches from the floor; is that pretty good for a fifty-nine year old man? A. That's pretty good.

Q. Do you feel that the man could go hunting and fishing now?

A. Well, that's a pretty general question. What kind of hunting and what kind of fishing? I don't think he would be able to carry a 200 pound buck out of the woods, but he does go hunting.

Q. Sure. You say he was ambulant without difficulty. That means when he walks, he walks normal? A. Yes.

Q. I mean, he doesn't have a guarded gait or shuffling? A. No.

(Testimony of William Robert McMurray.)

Q. All right. Now, doctor, sometimes we have an unstable fifth lumbar vertebra, regardless of cause, that gradually becomes worse, and on such a condition a fusion is indicated regardless of an accident, don't we? A. Yes, that's true.

Q. That's just part of a general gradual process of growing old? A. It could happen.

Q. Doctor, may I see your notes, please? [26]

A. Surely.

(Documents handed to counsel.)

The Court: Will you be some time?

Mr. Gearin: Yes, your Honor.

The Court: We will take a five minute recess. Ladies and gentlemen, you are excused for that period subject to the usual admonitions.

(A short recess was had.)

The Court: You gentlemen will stipulate that the jurors are all present?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: Yes, your Honor.

Q. (By Mr. Gearin): Dr. McMurray, did you find from your review of the X-ray pictures any evidence of arthritis in the man's low back?

A. Yes, he has arthritis in his low back.

Q. All right. Does his arthritis cause pain in the low back? A. It can, yes.

Q. And for how long a period of time would you say that this man has had arthritis in his low back?

(Testimony of William Robert McMurray.)

A. I can't say exactly. I can say this, that his arthritis, his arthritis pre-exists the present condition. He has had arthritis for a long time, but as far as putting it down as to months or years, I couldn't do that.

Q. Would you say he had this arthritis before the accident? [27] A. Yes.

Q. Now, Dr. McMurray, you saw the man on just one occasion? A. Yes.

Q. In your office? A. Yes.

Q. All right. And for how long a period of time did you examine him?

A. Approximately an hour to an hour and fifteen minutes.

Q. And you have written a lengthy report, as I have noted? A. Yes.

Q. And you had a pre-trial conference with Mr. Lezak and with Mr. Rerat, the plaintiff's attorneys?

A. Yes.

Q. How much time did you spend in preparing to testify and preparing your report in reference to making your examination?

A. I spent an hour and fifteen minutes examining him and about an hour and a half with the attorneys.

Q. All right. And then in addition the time of dictating your report? A. Yes, that's right.

Q. Now, you say that you are on the staff of a hospital. Does that mean that you are entitled to practice at that hospital? A. Yes.

Q. And every doctor, say up at St. Vincent's,

(Testimony of William Robert McMurray.)

that can take [28] patients there is on the staff?

A. Yes, that's true.

Q. And as far as the teaching at the medical school is concerned, the clinical instructor, that is a person who is in private practice and goes up there and teaches maybe a short period of time, a week or a month?

A. Yes, that's true.

Q. About how many clinical instructors do they have there at the University of Oregon Medical School that are not on the regular staff?

A. You mean that aren't full time men up there?

Q. Yes. A. Gosh, I don't have any idea.

Q. There would be a great number of them?

A. Well, taking into consideration all the departments, yes, uh huh.

Q. And you're not paid for that, are you?

A. No.

Mr. Gearin: Thank you, I have no further questions.

Redirect Examination

By Mr. Rerat:

Q. Now, doctor, when we speak of arthritis, will you tell us whether or not, when people reach a certain age that that's a normal situation to find arthritis in a back?

A. Yes, that's true. Most people over forty have some [29] arthritis.

Q. And, doctor, can a person having a condition of arthritis live a normal life without any pain if

(Testimony of William Robert McMurray.)

they are not caused to come in contact with what you might call trauma? A. Yes.

Q. Yes, and can trauma or injury, doctor, aggravate a pre-existing arthritic condition?

A. Yes, it can.

Mr. Rerat: That's all, doctor.

The Court: You may step down, doctor.

(Witness excused.) [30]

CHARLES L. CURTIS

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name?

A. Charles L. Curtis.

Q. Where do you live, Mr. Curtis?

A. In Portland.

Q. How long have you lived in Portland?

A. My entire life.

Q. How old a man are you?

A. Thirty-eight, sir.

Q. By whom are you employed?

A. Northern Pacific Terminal Company of Oregon.

Q. In what capacity? A. A switchman.

Q. How long have you worked for the Northern Pacific Railway Company—Terminal?

A. Seventeen and a half years.

(Testimony of Charles L. Curtis.)

Q. You are still working for them, are you?

A. Yes, sir .

Q. Will you state whether or not you are qualified as a pilot-herder?

A. Yes, sir, I am qualified. [91]

Q. Do you know what the duties are of a pilot-herder? A. Yes, sir.

Q. Will you tell us what they are?

A. The duties of a pilot-herder are to cut off passenger engines from passenger trains and couple them on, couple the engines on the passenger trains, couple and uncouple cars at the high shed when necessary and, well, that's about the size of it, I would say.

Q. Does the pilot-herder—I believe we have used the word “pilot-herder switchman” and the last witness said it meant the same thing so I will use the word with you, “pilot-herder”—does the pilot-herder have anything to do with the operation of the headlight on the diesel unit? A. No, sir.

Q. Does he have anything to do with the operation of the windshield? A. No, sir.

Q. Does he have anything to do with the lowering of windows so that the engineer or fireman can get a better view? A. No, sir.

Q. Does he have anything to do with the working of any of the gadgets as far as a locomotive diesel engine is concerned? A. No, sir.

Q. Who has the responsibility of keeping a lookout for obstructions on a track in the movement of a double diesel unit? [92]

(Testimony of Charles L. Curtis.)

A. Well, your engineer and fireman would.

Q. Well now, does the pilot-herder have any, does he have any responsibility, or does he have the responsibility of looking for obstructions on a track?

A. Well, if he was in the position, sir, he should be alert and——

Q. In other words, the general rules of railroad-
ing are safety first, if possible? A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Regardless of what kind of work you are doing, of course, it is up to all individuals, if it is possible, to use—to follow the safe course?

A. That is correct, yes.

Mr. Rerat: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Curtis, in a movement in which a pilot or pilot-herder is in the rear of a diesel unit which is making a backward movement, backward move, would you say that it would be the duty of such individual to keep an alert lookout?

A. If that were, if he would be in a position to do so.

Q. Yes, if he was standing in front of the window during a back-up movement, he should be keeping a lookout?

A. Well, it depends on if he was in position to see that, yes. [93]

Q. If he was in such a position, would it be his obligation and his duty to keep a lookout?

(Testimony of Charles L. Curtis.)

A. Why, yes.

Q. Is it the duty of the pilot-herder to protect the crossings?

A. Well, if—in a back-up movement such as that?

Q. In any movement.

A. Not public crossings, no.

Q. All right, in a back-up movement would it be his duty to protect a crossing?

A. It would be if there was nobody else in the cab, yes.

Q. Would it be his duty to protect the rear end?

A. As far as flagging is concerned, do you mean, or——

Q. Well, just the words, “protecting the rear end.”

A. Well, yes.

Mr. Gearin: That is all. Thank you, sir.

Mr. Rerat: That is all. Thank you, Mr. Curtis.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Rerat: Call Mrs. Reiner. [94]

MARGARET REINER

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. What is your full name, please?

A. Mrs. Margaret Reiner.

Q. Where do you live, Mrs. Reiner?

A. At 2035 Southeast Ellis Street.

Q. You are the wife of the plaintiff in this case, Frank Reiner?

A. Yes, sir.

Q. How long have you two people lived in Portland, Oregon?

A. Approximately 36 years.

Q. How long have you been married?

A. Forty-one years.

Q. During the time that you have been married, Frank, your husband, worked for the Northern Pacific Terminal Company?

A. Pardon me. I didn't hear you.

Q. I say, your husband worked for the Northern Pacific Terminal Railway Company?

A. Yes, sir.

Q. On February 6, 1955, was he in a railroad accident?

A. Yes, sir.

Q. Up to that time, he worked for the railway company for [95] about how long?

A. Thirty-six years.

Q. Do you recall that evening, the night of February 6, 1955, when he came home?

A. Yes, sir; I do.

(Testimony of Margaret Reiner.)

Q. Who brought him home?

A. My son-in-law and I helped him up the steps.

Q. When he got in the house, will you just describe his appearance to us, please?

A. Well, he was very pale, and, well, he was aching all over, and hurt.

Q. What did you do for him then?

A. I put on some hot packs for him immediately and gave him some anacins to relieve the pain, and he was in misery all night, and from there on for a long time.

Q. What did you notice, if anything, about his left leg? A. It was all swollen.

Q. Would you tell where the swelling started and where it ended?

A. Well, from above the knee on, clear on down.

Q. Where did you put the hot applications on?

A. On his, above, well, from his hip on, clear on down to his foot, and electric——

Q. Did you put on any hot pads or any pad any place else?

A. And an electric pad on the back. [96]

Q. The next day was the doctor called?

A. Yes, we called him, and he was not able to come out right away, but he told me what to do, and, of course, I had been putting the applications on anyway.

Q. Do you recall when the doctor did come out?

A. Pardon?

Q. I say, do you recall when the doctor did come out? A. Yes.

(Testimony of Margaret Reiner.)

Q. When was it about?

A. Well, do you mean what time of the day?

Q. No, when did he come out after the sixth?

A. Oh, it was around the tenth.

Q. That was Dr. Mundall? A. Yes.

Q. When Dr. Mundall—before he came out, how did your husband get around the house when he wanted to go to the bathroom?

A. Well, he had to use crutches. He just couldn't put his weight on his foot at all.

Q. Now then, did your husband continue under the care of Dr. Mundall? A. Yes, sir.

Q. Then he entered the hospital, did he, the Good Samaritan Hospital? A. Yes, sir. [97]

Q. He was in the hospital several times between that time and the present time; is that correct?

A. That is correct.

Q. What care and attention have you given your husband since the accident up to the present time?

A. Applications, a lot of applications.

Q. Where?

A. Practically every day to ease up the pain.

Q. Where do you give him these applications, Mrs. Reiner?

A. Well, below both legs and the electric pad on the back.

Q. The record shows your husband entered the hospital for the fusion operation in October of 1955, and was there about twenty-nine days?

A. That's right.

Q. Or twenty some days. Did you see him in

(Testimony of Margaret Reiner.)

the hospital? A. Every day.

Q. Since he has been home and up to the present time have you still continued to put the hot pad on his back? A. Yes, I have.

Q. The hot applications on his leg?

A. Yes, sir.

Q. During the time that your husband worked for the railroad company prior to February 6, 1955, what was his general condition of health?

A. Well, I would say it was good. [98]

Q. Do you recall an incident in 1952, I think it was, where your husband twisted his knee when he was hunting? A. That is correct.

Q. He also had a lumbago in his back?

A. Yes, he had taken up quite a bad cold.

Q. At that time do you recall that the doctor prescribed a corset for him to wear?

A. Correct.

Q. How long did he wear that?

A. I don't imagine it was over six weeks.

Q. Do you recall how long that he was out of work at that time?

A. Not just exactly but not very long. It was——

Q. Well, from—I am sorry, I didn't mean to interrupt you. What was that?

A. I don't remember just exactly how many days he was off at the time.

Q. Then from that time, from 1952 up until the time that he had this accident, February 6, 1955, had he had any trouble with his back if he worked steady? A. No, sir.

(Testimony of Margaret Reiner.)

Q. Before that time, that would be 1952, from the years he worked with the company did he work steady for the company? A. Yes, sir. [99]

Q. There was some discussion about your husband hunting and fishing. Since the accident has he gone out hunting? A. We have gone, yes.

Q. When you say "we" you mean what?

A. Well, my husband and son.

Q. Your son is how old, Mrs. Reiner?

A. He is thirty-three.

Q. Thirty-three. He is working for the Northern Pacific Terminal Railroad? A. Correct.

Q. When you had gone out hunting, you say you would go with your husband?

A. That is correct.

Q. Will you tell us what his activity has been during the occasions that he has been out?

A. Well, we like the outdoor life, but just since the accident he has not, he isn't able to do those things like he used to, just goes and sits some place, and if he is lucky, well all right, but he has not been lucky so we didn't get anything.

Q. Also there was something said about catching a salmon. A. That is correct.

Q. A 31-pound salmon?

A. Correct, I netted it.

Q. You were with him at that time? [100]

A. Correct.

Q. You were the one that netted it?

A. Correct; very proud of it.

(Testimony of Margaret Reiner.)

Q. When you on other times got out in the fresh air and sunshine, would you have gone with your husband on those occasions?

A. Correct; yes, sir.

Mr. Rerat: I think that is all.

Cross-Examination

By Mr. Gearin:

Q. Mrs. Reiner, you say your husband has difficulty getting around since the accident?

A. Well, he has been hurt, as you know.

Q. Has it been difficult for him to get around?

A. Yes, it has.

Q. You have been in the courtroom yesterday and this morning?

A. Pardon?

Q. You were in the courtroom yesterday?

A. I don't understand that.

Q. Were you here in this courtroom yesterday?

A. Yes, sir.

Q. And we have noticed that Mr. Reiner has some difficulty walking? [101]

A. That is correct. That's just the way he feels, just like you see him walking.

Q. All the time?

A. Yes, sir.

Mr. Gearin: I have no more questions. Thank you.

The Witness: That is not put on.

Mr. Rerat: That is all, thank you, Mrs. Reiner. Your Honor, the plaintiff rests.

Mr. Gearin: May I have five minutes, your Honor?

The Court: Yes. We shall take the morning recess at this time. You are excused for five minutes, subject to the usual admonition, Ladies and Gentlemen.

(Thereupon, the Jury retired.)

(A five minute recess being had, and the Jury having returned to the box, the following proceedings were had:)

The Court: Is it stipulated, Gentlemen, that the Jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: You may proceed.

Mr. Rerat: If your Honor please, at this time I would like to have permission of the Court to reopen to just clarify one of the rules of the company that has been testified to here that I was not familiar with until just after recess. [102]

The Court: You may.

Mr. Rerat: Mr. Leap, will you take the stand again?

JOHN F. LEAP

recalled, having been previously sworn, testified as follows:

Direct Examination

By Mr. Rerat:

Would you hand the witness this book, please, Mr. Bailiff?

(Book presented to the witness.)

Q. Mr. Leap, I think you were asked and you

(Testimony of John F. Leap.)

did read Rule 106, and in that rule 106 it refers to a pilot. You are familiar with that?

A. Yes, sir.

Q. In the rule 106 that you read?

A. Yes, sir.

Q. Now, is the pilot that is included in that rule the same as a pilot-herder? A. Well, no.

Q. Is there a definition in the rule book of the company of a pilot? A. Yes, sir.

Q. Will you turn to that and just read that, please?

A. "A pilot is an employee assigned to a train when the engineer or conductor or both are not fully acquainted [103] with the physical characteristics or rules of the railroad or a portion of the railroad over which the train is to be moved."

Mr. Gearin: That is on page 8.

Mr. Rerat: We offer that part of the rule in evidence.

Mr. Gearin: I thought all the rules were in evidence.

Mr. Rerat: I think, Counsel, you are right on that so it will not be necessary.

Q. When a train stops, or rather when a unit of two diesel engines is proceeding on a main-line track going in a southerly direction and a stop is made by the engineer without the knowledge or consent of the pilot-herder, and a reverse movement is going, is supposed to be made—under those conditions, what would it be necessary for the pilot-herder to do?

(Testimony of John F. Leap.)

A. Could we have the question read?

Q. Do you understand it, or do you want me to repeat it? A. You can clear it up.

Q. Assuming that two double units, a diesel double unit is traveling south, and we will say it stops at 17th Street unbeknown to the pilot-herder, and then a reverse movement is made—is to be made against the traffic. What would it be necessary for the pilot-herder to do under those circumstances?

A. Well, first he should be informed of the movement. [104]

Q. Yes.

A. And then he would get out of the units wherever he might be and go back along the track to protect the movement, the reverse movement of the units.

Q. Is that the customary and usual way of doing that?

A. Yes, protecting the train, the engines, in that manner, yes.

Mr. Rerat: That is all.

Cross-Examination

By Mr. Gearin:

Q. Mr. Leap, Counsel ask you in the first part of the question about the train being stopped without the knowledge or consent of the pilot-herder. The pilot-herder has some position of authority, does he not, which would, do you say, require him to give his consent to this? A. No.

(Testimony of John F. Leap.)

Q. In the back-up movement such as this, he would have some obligation to protect the reverse movement, would he?

A. If he knew it was going to be made; yes, sir.

Q. And if he were told that they were backing up, he would have an obligation to protect the back-up movement? A. Yes.

Mr. Gearin: Thank you, sir; no further questions.

Mr. Rerat: That is all; no further questions.

The Court: You may step down. [105]

(Witness excused.)

Mr. Rerat: Your Honor, now the plaintiff rests.

The Court: Plaintiff rests. Mr. Gearin, you may proceed.

Mr. Gearin: We will call Mr. Moore. [106]

LEO B. MOORE

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Moore, you were a hostler helper on this train in which Mr. Reiner was the pilot-herder?

A. Yes, I was.

Q. At the time the accident we have been talking about happened? A. Yes.

Q. Prior to that time where had you been riding on the train? A. In the forward cab.

(Testimony of Leo B. Moore.)

Q. As you came in toward the Union Station, what happened?

A. We stopped at 17 crossing and I went—they gave a “back-up,” told me to go to the rear unit and tell them we was going to back up and have the train placed to come back in reverse, and so I did.

Q. All right, did you go back to the rear end?

A. Yes.

Q. Who was there?

A. Mr. Reiner and Ray.

Q. You said Ray—Bray? A. Bray. [107]

Q. What was Mr. Reiner’s position at this time?

A. He was sitting in the engineer’s seat.

Q. What was his job classification? What did they call him? A. He was a herder.

Q. What is Mr. Bray’s classification?

A. He is a boilermaker.

Q. Did you at that time have a conversation with Mr. Reiner? A. I did.

Q. What did you tell him?

A. I told him we was going back to 20th Street and make another trial.

Q. Was anything said about the rear headlight?

Mr. Rerat: I object to that as leading and suggestive.

The Court: Overruled.

Q. (By Mr. Gearin): What, if anything was said about the rear headlight?

A. Yes, I walked back, he was sitting there, and where it was—the cab light was on, and then I

(Testimony of Leo B. Moore.)

asked where the headlight switch was as I couldn't see in the row of buttons, and I turned it on bright, and he says, "You don't make a reverse movement with the bright headlight on," so I then clicked it to dim.

Q. What, if any, effect would that have upon the visibility to the rear? [108]

A. Well, when the headlight was on bright I could see all the switches all the way back was all clear, and when the headlight was clicked to dim you could only see the car in your unit in front of you.

Q. Now, on the back-up movement who, if anybody, in the back of the unit in which you were riding was responsible for the movement?

A. The herder.

Q. Who would that be in this case?

A. Mr. Reiner.

Q. Who had responsibility for the—strike that—what, if any, authority did you have with respect to Mr. Reiner's duties and activities at that time and place?

A. Nothing at all.

Q. Did you rely upon anyone for the conduct of the movement, and if so whom?

A. Mr. Reiner——

Mr. Rerat: Just a minute, please. Your Honor, that is objected to as leading and suggestive and incompetent.

The Court: Overruled. You may answer.

Mr. Gearin: Would you read the question?

(Last question read.)

(Testimony of Leo B. Moore.)

The Court: I will reverse the ruling. I will sustain the objection in that form.

Q. (By Mr. Gearin): Did you station yourself for a look out [109] for the rear movement?

A. I did when I turned the headlight up on bright. As I looked, it was clear, and I gave the three bells to come back, and then Mr. Reiner was in the vision, see.

Q. Then he got into the seat?

A. He was in the seat at all times.

Q. All right. Now, after you gave the three-buzzer signal, what happened then?

A. Well, he said, "Turn the light to dim," and I did, and we went, oh, I would say an engine length, and I felt a log in the engine, and I said, "Boxcars," and I jumped for the buzzer as it was the closest thing to me for a stop signal, and then I missed, and we hit, and I dove for the floor.

Q. How large were the units that you had there?

A. They were approximately, over-all, I imagine 40 feet or better.

Q. Where is the buzzer located?

A. The buzzer is located in front of the control panel.

Q. I am handing you Photographs 25-A, -B, -C, down to -J and ask you if you can identify those. I have shown these to counsel already, your Honor.

The Court: Are they in evidence?

Mr. Gearin: No, sir.

The Witness: In this picture is the speedome-

(Testimony of Leo B. Moore.)

ter [110] showing and the fireman, and the hostler seat.

Q. Does that show the inside of a Diesel unit?

A. Yes, that is the inside of the unit.

The Court: What number is this?

The Witness: Twenty-five-R.

The Court: Twenty-five what?

The Witness: R, isn't it? Is this the number?

The Bailiff: B.

The Witness: Oh, B, pardon me.

Q. (By Mr. Gearin): Do you have a picture there showing where the buzzer is located? Would you look at that, please, Mr. Moore?

A. Yes, this one shows the buzzer.

Q. All right, would you take this red pencil and please put a circle around the buzzer?

The Court: "This" is numbered what?

The Witness: Twenty-five-A.

Q. (By Mr. Gearin): With regard to the photographs, do they show the inside of the locomotive, I mean of the Diesel engine? A. Pardon?

Q. Do they show the inside of a Diesel locomotive? A. This one does, yes.

Q. All right now, there are some that do not. Do you know what they are? [111]

A. This is leaving the Lake Yard here.

Q. Do you know from what type of engine that is taken from? Can you tell?

A. This is a switch engine here leaving the yard.

Q. Well, I mean from what kind of an engine was that taken, if you know?

(Testimony of Leo B. Moore.)

A. Oh, I don't offhand recollect the name of it.

Q. Now, the pictures of the inside of a locomotive or engine, was that the same kind as you had that night?

A. Yes, it is.

Mr. Gearin: We will offer this in evidence, your Honor, only showing mostly the inside of the cab.

Mr. Rerat: I have seen the pictures, your Honor. No objection.

The Court: Exhibits 25-A to -J will be received in evidence.

(Thereupon, photographs previously marked Defendant's Exhibits 25-A through -J, inclusive, for identification, were received in evidence.)

Mr. Gearin: I have no further questions.

Cross-Examination

By Mr. Rerat:

Q. Mr. Moore, as I understand it, you were a foreman that night; were you not? [112]

A. I was the helper.

Q. Yes, well, you were called a fireman, and Mr. Meyers was the engineer?

A. It is not classified as that. He is a hostler; a hostler and a hostler helper.

Q. Let me ask you this. Your duties were the duties of a railroad fireman; were they not?

A. Yes.

Q. That night? A. Yes.

Q. And the duties of a hostler are the duties

(Testimony of Leo B. Moore.)

of a railroad engineer; is that correct, in the operation of the engine? A. Yes.

Q. Now, this was a double-unit Diesel; was it not? A. Yes.

Q. When you started out from the depot that evening you—there is a place in front where the fireman or the hostler helper sits, and the other place where the hostler or the engineer sits; is that correct? A. Yes.

Q. When you travel from the depot to the Guilds Lake yard, that is approximately about two miles; is it not? A. Yes.

Q. When you went down there with the engineer, the engineer [113] sits on the right side, and the fireman on the other side; is that correct?

A. The engineer is on the left, and the fireman is on the right.

Q. Yes, and that is where you maintained your position? A. Yes.

Q. When you took the unit down to the Guilds yard; is that correct? A. Yes.

Q. You have the duty of keeping a proper lookout to see that the track is clear and see that there is not any obstructions on the track, is that not correct? A. Yes.

Q. You have the same duty as the—you as fireman or hostler helper, you have the same duty as the hostler or the engineer; is that correct?

A. Yes.

Q. That was your duty, to keep a proper lookout and to operate the various mechanisms or gadgets on that train; is that correct?

(Testimony of Leo B. Moore.)

A. Yes.

Q. Now, you are familiar—will you take this, please?

(Presenting witness with volume.)

Q. Handing you Exhibit Number 21, were you familiar that particular night with Rule 922? [114]

A. Yes.

Q. Will you read that rule to us, please?

A. (Reading): “Firemen are to be—” couldn’t someone else read this, please.

Q. Yes, I would be glad to.

Mr. Gearin: It is all right with me.

Mr. Rerat: If counsel has no objection.

Mr. Gearin: No.

Mr. Rerat (Reading): “Rule 22: Firemen are subordinate to engineers. Engineers must see that firemen are familiar with and perform their duties, instruct them if necessary, and see that they are conversant with and properly understand and comply with the rules and special instructions, particularly those relating to the operation of trains. Disobedience and incompetency must be reported. The engineer or the fireman must not move the train or any part of its machinery unless he knows that it can be done without injury to anyone. The engineer or fireman must not go underneath the engine without notifying the other * * *”

Now, that rule was in force and effect, and you were familiar with that rule; is that correct?

A. Yes.

Q. You were also familiar, were you not, with

(Testimony of Leo B. Moore.)

a bulletin that was issued on February 2, 1955, that related to power tests? [115] A. Yes.

Q. And a power test is what?

A. Well, a power test would be to come to a maximum speed to get the, what you call it, motors in gear.

Q. In other words, when the units are standing still, you would say that unit—the Diesel units are standing still, then the machinery of the units gets up to a speed, a high speed, so that all that is necessary is to just release a gadget, and then the Diesel goes forth with a high speed; is that correct?

A. No, sir.

Q. How does it operate?

A. Well, you start out generally just like you would drive a car, and then you pick up your speed for your motors to kick in.

Q. That movement was prohibited and against the rules of the company; is that correct?

A. Yes.

Q. That would be a movement whereby you would stop on the main-line track going in one direction, and the transition tests would be in the reverse movement; is that correct?

A. Well—yes.

Q. You were familiar with that bulletin, you had been issued a bulletin that was given—that was issued by the company to the firemen and to the engineers on February 2, [116] 1955; is that correct? A. Yes.

Q. Four days before this accident happened. As

(Testimony of Leo B. Moore.)

far as the pilot herder is concerned he has nothing to do with the operation of the engine such as in the operating of any gadget or running the train in any way, does he?

A. No, sir, only on clearance of the engine.

Q. That is right. Now when you were coming back after the engine had been down to Guilds Lake, you started from Guilds Lake in the place in front of the engine where you were supposed to be; that is correct? A. Yes.

Q. By the fireman's side, and traveling south, coming back from Guilds Lake to the terminal, you would be on the left side, or you would be on the east side; is that correct? A. Yes.

Q. And the engineer would be on the other side or would be on the right side; is that correct?

A. Yes.

Q. These two engines, they were back-to-back; is that correct? A. Yes.

Q. So that on the south end, the end that you were traveling, the cab, is that located for the fireman and the engineer sitting, and also on the back end there is also the same thing [117] there on the rear engine, that would be on the north end, a place for the fireman and for the engineer to sit; is that correct? A. Yes.

Q. When you started out from Guilds Lake, there was a stop made by the engineer at 17th Street; is that correct? A. Yes.

Q. What was his name? A. Meyers.

Q. Are you still working with Mr. Meyers?

(Testimony of Leo B. Moore.)

A. No.

Q. He is still with the company at the present time?

A. Yes.

Q. But you have not worked with him for a while?

A. No.

Q. When the Diesels stopped there, did you have anything to do with the stopping of those Diesels?

A. No.

Q. Did you even know they were going to stop at that place?

A. Well, I heard the words then, "We will stop there."

Q. From Mr. Meyers, the engineer?

A. The electrician.

Q. Well, then, when you made the stop then, you were told at that time, were you not, by Mr. Meyers that you were going to make a reverse movement, and all he asked you to [118] do was to go back to the rear of the cab and turn on the headlight, see if it was clear, and give him three bells; is that right?

A. And turn the radio on.

Q. That is all that he told you; is that correct?

A. Yes.

Q. He never gave you—Mr. Reiner was not sitting in the front end of the cab, was he?

A. No.

Q. No. He was sitting, he was in the rear end of the cab; is that correct?

A. That's right, yes.

Q. There was nothing said by Mr. Meyers to

(Testimony of Leo B. Moore.)

you about giving any instructions to Mr. Reiner; is that correct? A. Well, he knew I would.

Q. I just asked you, all that I am asking is whether—— A. No.

Q. ——he gave you any instructions to give to Mr. Reiner? A. No.

Q. No. Now, did he tell you when you left there to give instructions to anybody as to what you were going to do? A. No.

Q. No. When you went back there—strike that—you could have operated that engine in a backward movement by your being on the east side and the engineer being on the right [119] side? There is a place where both of you could sit there; isn't that correct, in the rear of the second Diesel?

A. Yes.

Q. But you did not do that?

A. May I have the question again?

Q. I might say if you do not understand any of my questions, just ask me, and I will try to make that clear. Will you just read——

The Court: I would suggest you rephrase it. You spoke of his operating the Diesel. You said “you” operating. Do you mean by that that the Diesel could be operated by two persons who were supposed to operate it?

Mr. Rerat: Yes, the Diesels could be operated by the persons that were supposed to operate it.

That was you and Mr. Meyers?

The Court: Now don't put that in your question.

(Testimony of Leo B. Moore.)

Mr. Rerat: Well, let me start over again, your Honor.

Q. In the rear unit there was a place for the engineer and for the fireman to sit, or the hostler helper; isn't that correct?

A. Yes, there is room to sit.

Q. Could the Diesel have been operated from some other place the same as from the front end?

A. No.

Q. When you went back there, did you tell anybody how far [120] that you were going to make a backward movement? A. Yes.

Q. Did you tell them the distance that you were going to go?

A. I didn't exactly say the distance. I told them to the 20th Street.

The Court: To whom did you tell that?

The Witness: To the herder and the boiler-maker.

The Court: Who was the herder and who was the boilermaker?

The Witness: Ray Brady, and what is the——

The Court: I cannot hear you. Would the court reporter read the last answer?

(Last answer read.)

The Witness: And Frank Reiner.

Q. (By Mr. Rerat): The track that you came up on was a straight track, was it not, the west-bound main line? A. Yes.

(Testimony of Leo B. Moore.)

Q. Were there any obstructions between the place that you were—where the rear of the second unit was standing, where the switch stand or the switch light was located right on the west side of the westbound main-line track?

A. There was none.

Q. No obstructions at all, and you were familiar, were you not, with that route? [121]

A. Yes.

Q. You had been over that route before. Now, in this stand, this switch stand that is located on the west side of the westbound track, there is a light that shows a green or red depending on the way the switch is lined; is that correct?

A. That is correct.

Q. Yes, and if it looks to—about how far would you say that switch light was from the rear of the second unit that was standing on the westbound main-line track?

A. Three or four units lengths.

Q. About what?

A. Three or four-unit lengths.

Q. That would be how far away, would you say, about? When you say units lengths, what do you mean by a unit length?

A. Well, the length of the unit, in my judgment it was three or four lengths of the unit.

Q. And the unit would be how long?

A. From 40 to 50 feet, something in that order.

Q. About 40 to 50 feet. Then, as I understand

(Testimony of Leo B. Moore.)

your testimony the switch stand was about, would you say, 160 feet or more?

A. Something on that order.

Q. About 160 or other.

You had full control of the handling of the light in back of that Diesel engine; did you not? [122]

A. No.

Q. Your instructions were from Mr. Meyers, were to go to the rear of the cab, turn on the headlights, and see if it was clear, and then give him three bells to come back? A. That's right.

Q. All the instructions he gave you?

A. Yes.

Q. So when you went back there you did consider it your duty to look out to see if everything was clear before the movement went back; is that correct? A. That's right.

Q. You felt, did you not, it would be unsafe to move before you could see whether the movement could be made in safety in a reverse movement?

A. That's right.

Q. Now, when you looked out the switch would be directly north, would it not, as you said, 160 feet or so; something like that?

A. I imagine it was directly in front, but it was a little over that distance, yes.

Q. About what would you say, approximately? Would you say approximately, or would you say more than that?

A. I would say a little more than that would be the distance.

(Testimony of Leo B. Moore.)

Q. About 160 feet or some more, as you said, when you looked [123] out, what did you observe about the switch light as to whether it was green or red for traffic going in a reverse position?

A. It was green.

Q. It was green? A. Yes, it was clear.

Q. From that time when it was green until the time of the collision how much time elapsed, would you say? A. Oh, a very few minutes there.

Q. Would you say minutes or would you say seconds? A. Well, either one.

Q. Let me ask you this. When you looked and saw that the light was green, that meant to you that that switch lighting from the crossover, from the eastbound main to the westbound, that the switch was not lined; was that correct?

A. Well, at the track it was not lined for the other track.

Q. That is what I mean. A. Yes.

Q. When you say you looked and you saw it was green, you felt then that it was safe to proceed in a northerly direction; is that correct?

A. Yes.

Q. Yes, and immediately when you saw that it was green and you felt it was safe, then what did you do? [124]

A. Well, before that I turned the light on bright before moving and saw that the track was clear, and gave the three bells to go back, and then at that time I was told to turn it to dim.

Q. I am just wondering whether this is clear.

(Testimony of Leo B. Moore.)

Did you immediately when you went up to the back window and you looked down at this switch light there, was there any light on the back at all at that time? A. Yes, it was on bright at that time.

Q. It was on bright? A. Yes.

Q. And you say that you had a clear view?

A. Yes.

Q. And it was green at that time?

A. Well, the track was clear at that time.

Q. Then as soon as it was clear, then you gave the buzzer, gave the three buzzes, and the unit started back immediately? A. Yes.

Q. Is that correct? A. Yes.

Q. What ever time that it took to do the things that you said was the amount of time that was involved there? A. Yes.

Q. Mr. Moore, looking at that switch light and seeing the switch light was green and then giving the signals to proceed, [125] do you say that with the light on dim as you were proceeding when—back in a northerly direction after you had given the direction for the signal to go back—then——

The Court: Do you wish to strike the first question you have asked him?

Mr. Rerat: Yes, your Honor.

The Court: It is very confusing.

The Witness: It is.

The Court: I would suggest you put simple questions.

Mr. Rerat: Yes.

Q. When the unit started to go back, from the

(Testimony of Leo B. Moore.)

time it started until the time of the impact in what direction were you looking?

A. Towards the rear.

Q. At that time with the engine, with the light on dim, how far could you see ahead of the train?

A. About here to the end of the building—to the room, I would say.

Q. How far do you want that to be, in about how many feet?

A. I would say that is about 50 feet.

Q. As you were proceeding then after the unit started in the reverse direction, when did you first see an obstruction on the track?

A. Would you repeat that? [126]

The Court: I suggest you rephrase it.

Q. (By Mr. Rerat): When the movement started in a northerly direction, the back-up movement, how far had that movement gone before you saw something on the westbound track, you saw cars on the track?

The Court: You just keep compounding your question. What do you want to ask him, when he started to back up how far it had gone before he saw something on the track?

Mr. Rerat: How far, yes.

The Court: Why don't you stop at that. Is that your question? Can you answer that question?

The Witness: Well, we had got moving and had had time to turn the lights down.

The Court: About how far had you traveled? That is the question.

(Testimony of Leo B. Moore.)

The Witness: Oh, about twice the length of the engine.

The Court: Have you finished your cross-examination?

Mr. Rerat: Just a question, your Honor, that I would like to just check.

The Court: You say Mr. Reiner, the plaintiff here, was sitting in the engineer's seat?

The Witness: Yes.

The Court: Are there two engineers' seats?

The Witness: One engineer's seat.

The Court: Where was this man whom you called the [127] engineer? Where was he sitting?

The Witness: He was in the front unit.

The Court: There are two units; is that it?

The Witness: There is two units.

The Court: There were two units; they were hooked together back-to-back?

The Witness: Back-to-back, yes.

The Court: So in the forward unit there was a seat for the engineer and a seat for the fireman; is that right?

The Witness: Yes, there is three seats in each end.

The Court: And the rear end would be the front of the other unit; is that it?

The Witness: That's right.

The Court: That is, the rear of the two units attached together?

The Witness: Yes.

(Testimony of Leo B. Moore.)

The Court: This plaintiff, Mr. Reiner, was sitting in the engineer's seat?

The Witness: Engineer's seat, yes.

The Court: In the Diesel unit facing to the rear; is that it?

The Witness: Yes.

The Court: You and—who is the other man?

The Witness: Ray Brady.

The Court: You and Brady were in the fireman's seat? [128]

The Witness: Brady was in the fireman's seat, and I was standing in front of the control panel.

The Court: In the unit facing forward?

The Witness: Yes, where I could look out.

Q. (By Mr. Rerat): Well now, when you came back to the cab did Mr. Reiner get up from the seat? A. No.

Q. That is when you came back to the back unit?

A. No, not——

Q. When you were operating—strike that—during the time that you were in the back of the—in the back unit, the time you went—from the time you went back to turn on the headlight up until the time of the collision, where were you standing all the time?

A. I was standing in front of the control panel at the end of the control panel.

Q. That is where—shown on these pictures here; is that correct? A. Yes.

Q. If you had not moved from the front of the cab where you were seated at the time the stop—

(Testimony of Leo B. Moore.)

that the Diesel stopped and were in the cab on the opposite side, where Mr. Meyers, the engineer, was sitting, after the movement had been made in a backward movement, were you sitting up in front instead of being in the back, could you have seen the switch lights from where you were at that time?

A. No.

Mr. Rerat: That is all.

Redirect Examination

By Mr. Gearin:

Q. Could you have seen them if the headlight had been on bright? A. Yes.

Q. Was this a power test? A. No.

Q. Were you hurt in the collision?

A. I was shook up quite a bit.

Q. When you started the backward movement, will you describe, please, what kind of a movement it was as to being smooth or jerky?

A. It was smooth, just on the normal back-up.

Q. Thank you.

The Court: Anything further of this witness?

Mr. Rerat: No further questions.

The Court: You may step down.

(Witness excused.) [130]

RAY C. BRAY

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Bray, what is your occupation?

A. Boilermaker.

Q. By whom are you employed?

A. Northern Pacific Terminal.

Q. Were you in the cab of the rear locomotive with Mr. Reiner? A. Yes, sir.

Q. I mean, the engine thereof, and were you there when Mr. Moore, the hostler helper, came aboard? A. Yes, sir.

Q. Now, as boilermaker, do you have anything to do with the operation of trains? A. No, sir.

Q. Was there any conversation in the cab when Mr. Moore came back and got in?

A. I heard him tell Mr. Reiner that the engineer wanted to move back.

The Court: I cannot hear you, Mr. Bray. You heard him tell Mr. Reiner?

The Witness: That the engineer wanted him to tell [131] the herder he had to make a move back.

Q. (By Mr. Gearin): What, if anything, was done or said with regard to the headlight?

A. The headlight was turned on bright, and Mr. Reiner spoke up and said, "You can't back up with a bright light."

Q. Then what happened?

(Testimony of Ray C. Bray.)

A. The light was turned on dim.

Q. Was there any light in the interior of the cab?

A. Yes, the dim light was on.

Q. Was that dim light ever turned off?

A. Not to my knowledge, no.

Q. Do you know where the buzzer is that we have been talking about?

A. I do.

Q. What is the fact as to whether or not you had ever seen Mr. Reiner operate that buzzer before?

A. Once in awhile he did operate it when he wanted to cross the Interlocken Plant.

Q. When you started the back-up movement, will you tell us what kind of a movement it was as to being rough, smooth, or jerky or how?

A. It was very smooth.

Q. Were you hurt in the accident?

A. No, sir.

Mr. Gearin: I have no further questions. [132]

Cross-Examination

By Mr. Rerat:

Q. Mr. Bray, as I understand it, you had nothing to do with the operation of the engine, is that correct, any of the gadgets?

A. No, sir.

Q. You had nothing to do with the operation of the headlights?

A. No, sir.

Q. You had nothing to do with the operation of the windshield wiper?

A. No, sir.

Q. You had nothing to do with any of the gadgets on the engine?

A. No, sir.

(Testimony of Ray C. Bray.)

Q. You knew that the engine was being operated by the fireman and the engineer, the hostler and the hostler helper; is that correct?

A. That's right.

Mr. Rerat: That's all.

Mr. Gearin: I have no further questions.

The Court: You may step down.

(Witness excused.) [133]

GEORGE CHARLES RUSELLI

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Ruselli, where do you live?

A. Portland, Oregon.

Q. What is your occupation?

A. I am a photographer and investigator.

Q. Do you recognize Mr. Reiner, the gentleman sitting here? A. Yes, sir, I do.

Q. Do you recognize the lady with him?

A. Yes, sir.

Q. Who is she? A. Mrs. Reiner.

Q. Have you had occasion to see them before today? A. Yes, sir.

Q. At whose request did you see them?

A. At your request, sir.

Q. You say you are a photographer. Did you take photographs of Mr. Reiner?

(Testimony of George Charles Ruselli.)

A. Yes, sir, I have.

Q. What kind of photographs did you take?

A. Motion pictures. [134]

Q. When did you take these motion pictures?

A. On December 8th of 1956, and December 22, 1956; January 4, 1957.

Q. What type of camera did you use?

A. Bell and Howell, 16 millimeter, magazine loaded.

Q. What type of film?

A. Plus X, 16 millimeter film.

Q. Where were those photographs taken?

A. In the vicinity of Mr. Reiner.

Q. Do you have the equipment with you for projecting the motion pictures that you took?

A. Yes, sir, I have.

Q. Are they in the courtroom?

A. They are.

Q. I wonder if the Court will hand the witness a sealed exhibit and he should open it, please.

The Court: Is it marked?

Mr. Gearin: Yes, it is, your Honor

The Court: What number is it marked?

The Clerk: Twenty-eight.

The Court: Exhibit 28. You may unseal it and hand it to the witness.

(Exhibit handed to the witness.)

Q. (By Mr. Gearin): Calling your attention to the box that is inside a folded-up newspaper, what is that, Mr. Ruselli? [135]

(Testimony of George Charles Ruselli.)

A. This carton contains the motion pictures I took of Mr. Reiner.

Q. Are you able by means of the films that you have there and the projection equipment that you have in the courtroom to accurately and correctly portray on the motion-picture screen Mr. Reiner as he appeared to you at the time you took the photographs? A. Yes, sir.

Q. Are these the only photographs you have taken, the only film that you have exposed with reference to Mr. Reiner? A. Yes, sir.

Mr. Gearin: We offer those in evidence, your Honor.

Mr. Rerat: Your Honor, first of all, we would like to have an opportunity to see the films. There might not be any objection to them, but I would request time that I be allowed to see them before they are marked.

The Court: You are requesting that they not be exhibited before they are received in evidence?

Mr. Rerat: That is not in the presence of the jury until I have had a chance to see them. I have never seen them.

The Court: What is your objection?

Mr. Rerat: Your Honor, I object to them on the ground that I have not had an opportunity to see them and that they [136] would be incompetent and immaterial at this time. The request that I make, your Honor, is for permission to just see them first so I have an opportunity——

(Testimony of George Charles Ruselli.)

The Court: In other words, you wish a private exhibition of them?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: I have no objection, your Honor, as long as the Court is present.

The Court: How long will it take?

The Witness: Approximately 15 minutes, sir.

The Court: Fifteen minutes to run them?

The Witness: Yes, sir.

The Court: Can't we proceed with something else, and you gentlemen can see them——

Mr. Gearin: I have no other testimony, your Honor, with the exception of one or two exhibits which I can offer into evidence now, and then Dr. Carlson is coming at 2:00 o'clock, and I will rest my case.

The Court: Very well. Do you have any questions to ask this witness on cross-examination.

Mr. Rerat: No, your Honor, no.

The Court: Then except for the doctor you can rest?

Mr. Gearin: Yes, sir.

The Court: If these films are admitted?

Mr. Gearin: Yes, sir. [137]

The Court: Ladies and Gentlemen of the Jury, we will excuse you for 15 minutes, subject to the usual admonition.

(Thereupon, at 11:20 a.m., the jury retired from the courtroom.)

The Court: Will you set up your equipment right away and run them as quickly as possible?

(Testimony of George Charles Ruselli.)

(Thereupon, the witness set up motion picture equipment in the courtroom.)

The Court: Mr. Reiner, you and Mrs. Reiner may come forward and view them if you like and any other persons present in the courtroom if they wish to see them.

Are you ready, Mr. Rerat?

Mr. Rerat: Yes, your Honor, I was just wondering this, when he runs them, if he would run them in different portions, that if the witness would just state on the date that each one was run as you cover several dates.

The Witness: Yes, sir.

The Court: You introduce each one by saying, "These were run," and giving the date.

The Witness: Yes, sir. As far as the films we will show, they are taken on December 8, 1956.

(Moving pictures projected on screen.)

The Court: Is this a new thing?

The Witness: No, sir, that is the end of the 50-foot roll of film. [138]

Mr. Rerat: You have not started the second one, have you?

The Witness: This is still the same one.

These films were taken on December 22, 1956. Still the same date.

(Projection of pictures continued.)

The Witness: These were taken on January 4, 1957.

(Testimony of George Charles Ruselli.)

That is the total film I have of Mr. Reiner.

Mr. Johnson: That first picture, was that December 8, 1956?

The Witness: Yes, sir.

Mr. Rerat: He said '56. I wonder if he didn't mean '55.

The Witness: No, December, 1956.

The Court: Do you want the jury summoned, gentlemen? Leave that in the proper position that the jury can see it. Is there any objection to it?

Mr. Rerat: I would object to them on the grounds they are incompetent, immaterial, and that the pictures would be offered, I take it, for the purpose of impeachment, and there is nothing in these pictures that go to the impeachment of any of the testimony here by the plaintiff.

Mr. Gearin: And my position on that, your Honor, while it is not in the record, it has been obvious since yesterday that Mr. Reiner has been walking in a very guarded manner [139] throughout the entire trial with appearance of difficulty, pain, and discomfort and inability to move freely. The photographs which you have seen speak for themselves and impeach the actions of the plaintiff.

The Court: The objection will be overruled. You may state your objection in the presence of the jury, if you wish, and the Court will make a ruling.

(Discussion off the record.)

Mr. Rerat: Well, your Honor, we won't have any objection; whatever they are worth, very well.

(Testimony of George Charles Ruselli.)

The Court: Very well.

(Thereupon, the jury was summoned and returned to the jury box at 11:40 a.m.)

The Court: Is it stipulated, gentlemen, that the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes.

(George Charles Ruselli was recalled and resumed the stand.)

Q. (By Mr. Gearin): May I ask one question? Mr. Ruselli, what experience have you had in photography?

A. I was photographer with the Marine Corps.

Q. During the war?

A. Twice, during World War II and Korea.

Mr. Gearin: We offer the photographs in evidence and [140] ask that the witness be permitted to exhibit them to the jury.

Mr. Rerat: No objection, your Honor. I would like to ask now a couple of questions, but I will wait until the pictures are shown.

The Court: Suppose you ask them now if you have them in mind.

Mr. Rerat: Yes, I do, your Honor.

Cross-Examination

By Mr. Rerat:

Q. These pictures that were taken, they were arranged for by counsel for defendant?

A. Mr. Gearin, yes, sir.

(Testimony of George Charles Ruselli.)

Q. Did you go out yourself and take the pictures, or were you accompanied by someone?

A. I was by myself.

Q. You are being paid by Mr. Gearin for the time and services that you have rendered?

A. No, sir.

Q. Who are you being paid by?

A. Krout and Schneider.

The Court: Exhibit 28, the film will be received in evidence, and the witness will now exhibit the film to the jury.

(Motion picture films, heretofore marked Defendant's [141] Exhibit 28 for identification, were received in evidence.)

(Thereupon, the motion picture films above designated were projected on the screen in the presence of the jury.)

The Court: Can all members of the jury see? I take it, hearing nothing, you can all see. This picture now being shown was taken when, Mr. Ruselli?

The Witness: December 8, 1956.

The Court: 1956?

The Witness: Yes, sir.

The Court: December 8th?

The Witness: Yes, sir.

The Court: This film was taken when?

The Witness: This is also December 8, 1956.

The Court: Suppose you tell us when there is any change in date.

The Witness: Yes, sir, I shall. We are still on

(Testimony of George Charles Ruselli.)

December 8th. This is the end of the December 8th film. The next will be on December 22, 1956. These were also taken on December 22nd.

The next film was taken on January 4, 1957.

The Court: Does that complete the showing of Exhibit 28?

The Witness: Yes, sir. [142]

The Court: Are there any other questions of this witness?

Mr. Gearin: No, sir.

Mr. Rerat: Just one question. Did you at any time take out anything out of the hood of the automobile? A. No, sir.

Q. Or have it requested that it be taken out?

A. No, sir, I did not.

Mr. Rerat: That is all.

The Court: You may step down.

The Witness: Thank you.

(Witness excused.)

The Court: Your only other witness, as I understand, is the doctor?

Mr. Gearin: Yes, sir. I would like, however, at this time to offer in evidence the original Complaint in this case and also a Complaint in the action entitled *Frank Reiner vs. Northern Pacific Terminal Company of Oregon*, Civil Number 8538. The Clerk has the latter file on his desk.

The Court. The Complaint in this case is received in evidence and removed from the file, Mr.

Clerk, received in evidence as Exhibit—what is the number?

The Clerk: 30.

The Court: Exhibit 30.

(Original Complaint in this action, was [143] thereupon marked Defendant's Exhibit 30 for identification and received in evidence.)

The Court: Is there any objection to the Complaint in Civil 8538?

Mr. Rerat: No, I have no objection.

The Court: Received in evidence, Exhibit 31.

(Complaint in Civil Number 8538 was thereupon marked Defendant's Exhibit 31 for identification and received in evidence.)

Mr. Gearin: That is all I have, your Honor, until the doctor gets here at 2:00 o'clock.

The Court: The doctor will not be here until 2:00?

Mr. Gearin: I've tried to get him, but I am unable to, your Honor.

The Court: Very well, we will take a recess until 2:00 o'clock this afternoon. Before we separate, Ladies and Gentlemen of the Jury, I again must admonish you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of the trial. You are not to form or express an opinion on the case until after it has finally been submitted to you for your verdict. You are now excused until 2:00 o'clock this afternoon.

(Jury retires for the noon recess.) [144]

(2:00 p.m., trial resumed.)

The Court: Stipulated, gentlemen, the jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Proceed.

Mr. Gearin: We will call Dr. Carlson.

C. ELMER CARLSON

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Dr. Carlson, what is your occupation or calling?

A. I am a physician and surgeon specializing in orthopedic surgery which is bone and joint surgery.

Q. Dr. Carlson, when were you admitted to practice your profession? A. 1920.

Q. Of what schools are you a graduate?

A. University of Oregon Medical School, Reed College.

Q. Are you duly licensed to practice your profession in the City of Portland? A. Yes.

Q. You are on the staff of what hospital?

A. Good Samaritan Hospital, Emanuel Hospital, and Doernbecher Hospital. [105]

Q. How long have you been practicing your profession, I mean your specialty?

(Testimony of C. Elmer Carlson.)

A. Specialty since 1924.

Q. Did you receive special training for that?

A. I did.

Q. Doctor, did you have occasion to treat Mr. Frank Reiner, the plaintiff in this case?

A. Yes.

Q. In connection with an orthopedic problem?

A. That's right.

Q. When did you first see him?

A. May I have my notes?

Mr. Gearin: The notes are there, Mr. Clerk.
Will you hand them to the Doctor, please?

The Court: What exhibit is that?

Mr. Gearin: 32, your Honor, for identification.

The Witness: Your question is when did I first see him? I saw him on January 19, 1953.

Q. (By Mr. Gearin): Did you see him for treatment? A. Yes, sir.

Q. Was he referred to you.

A. Yes, he was.

Q. By whom was he referred?

A. Dr. J. E. Hughes.

Q. Did you obtain any history of complaints at that time? [106] A. Yes, I did.

Q. Will you tell us what history you obtained from the plaintiff in 1953?

A. Well, I might just read my first few lines, if that is all right.

Q. If you want to, you go right ahead, Doctor.

A. The patient states that years ago when working at the New Montgomery Building he was lifting

(Testimony of C. Elmer Carlson.)

a frog and injured his back. He said this steel weighed about 75 pounds. He said he is not sure if the present complaints are as a result of this early back injury; states in August, 1952, while in bed his back began to pain. At that time Dr. Mundal saw him, gave him some pills, prescribed a corset which he was wearing at the time that I saw him. He complained of his left knee at that time.

Q. Referring to his back, did you cause any X-rays to be taken? A. Yes, I did.

Q. What did they show, if anything, with reference to the low back?

A. Well, he had some arthritis, and also the last joint, which we call the fifth joint is thinned and narrowed.

Q. What was thinned or narrowed?

A. This joint space.

Q. What is between the joint space of the fifth lumbar [107] vertebra and the sacrum? What do they call it?

A. Well, that little cushion, we refer to them as discs, they are made out of cartilaginous material, and they act as cushions.

Q. What was the significance of narrowing of the intervertebral spaces, Doctor?

A. Well, that changes the relationship of the joint there and is apt to cause pain.

Q. Did he complain of pain at that time.

A. Yes, he did.

Q. Will you continue, if you will, Doctor—strike

(Testimony of C. Elmer Carlson.)

that. I am ahead of myself. Did you continue seeing him after that?

A. Yes, I saw him in May, 1953, when he was then referred by Dr. Mundal, and his complaints were similar at that time, and I took some X-rays at that time, and they showed the same thing.

Q. Will you continue then with the—what complaints he had and what you did for him and what his condition was from 1953 up until the present time or the last time you saw him.

A. Well, I saw him again on February 17, 1955, and at that time he gave a history. On February 6, 1955, that was eleven days before I saw him after he had jumped from a cab of an engine to the ground, and that he at that time [108] was thought to have had an injured leg. When he came into my office—he was taken to the hospital at that time and had some X-rays taken of the knee. Then when he came into my office, he was on crutches. This time he complained of pain in his lower back and on the left side of his leg just below the knee. The examination of his back at that time revealed some irritability at the last joint, the lumbo-sacral joint, this being on the left side, and the knee joint was all right.

Q. When you saw him in 1953, at any time was the plaintiff wearing a back brace or support?

A. Yes, the first time that I saw him he was wearing a corset.

Q. You had not prescribed that for him?

A. No, I hadn't.

(Testimony of C. Elmer Carlson.)

Q. How many times after that that you saw him did he continue to wear this corset?

A. Well, he was wearing it when I saw him on May 26, 1953.

Q. For what purpose, Doctor, do you ordinarily prescribe a back brace or a corset?

A. For protection of some painful joint.

Q. Is the joint that you have described in the low back between L-5 and the sacrum such a joint as would produce pain requiring a belt?

A. Yes, sir. [109]

Q. Will you continue, please, Doctor?

A. Well at this time on February 17, 1955, I made the diagnosis of sprain of this same joint, and there was nothing additional specific ordered for him at that time. I saw him again the next month at which time he was having—he had had some sort of an attack, he told me. I don't know just exactly what it was, but he was sent to Good Samaritan Hospital by his doctor at that time, and he remained there for four days. He told me at that time he coughed up some blood, and at this time he had some pain in his low back and also in his knee.

On March 31, 1955, I saw him again. This time he was still wearing a belt. He had some irritability of the lumbo-sacral joint at that time. He was then complaining of some pain in his—Some sciatic pain which had been present as early as January, 1953, and I thought he ought to have some rest for this reason, and sent him to the hospital, and treatment known as traction was applied. They put weights

(Testimony of C. Elmer Carlson.)

on the leg so as to relieve strain on the lower back. He went in the hospital on March 31st and was discharged on April 13th much improved.

When I saw him in May, 1955, he was wearing a different corset at this time, and he thought that the pain then was really all gone, as he commented to me at that time, but he was still concerned about his knee. [110]

I saw him—let's see, it was in May. I saw him again in August, and at this time he was again sent over by Dr. Mundal who thought he might have what is called a disc. That is the same thing we are talking about, a protrusion of this disc. Dr. Mundal thought he might need a fusion operation.

Q. Doctor, what disc are you referring to?

A. Between the fifth lumbar and the first sacral. That is the lumbo-sacral.

Q. Is that the first one that you first observed?

A. Same one. I am referring to the same one all the time.

Q. Thank you, Doctor.

A. He had gained a lot of weight. He was at that time wearing a corset, and that was in August. Then in September I saw him again, and I thought that since he was still having definite pain in this region it would be best to what we call stabilize the joint, to then remove what little motion that there is by doing what is known as a fusion operation which is the same as a bone graft in which an operation is done wherein the last vertebra and the sacrum are grafted together so that there is no

(Testimony of C. Elmer Carlson.)

motion in this joint. There was very little motion anyhow because the disc had been thinned out but apparently that continued to cause him some trouble so on October 4, 1955, this operation was performed. [111]

He then wore a cast for a period of time until January 6, 1956, and I saw him on a few occasions since then in the office, the last time being on April 3, 1956.

Q. Is that the last time that you saw him?

A. That's right.

Q. Now, Doctor, going back to 1953 with the narrow interspace between the last lumbar vertebra and the sacrum, assuming a man with that condition was doing heavy work, what would your prognosis be at that time with reference to his future ability to get along and do heavy work?

A. Well, when that joint, which is the one that is most commonly affected in all individuals, because that is where most of the strain of the back comes, and with the thinning of that cushion and wearing down of that cushion, why, that is the type of back that would then be subject to strain and disability.

Q. Doctor, you have mentioned the weight of the plaintiff. What effect, if any, does obesity have with reference to an unstable low back?

A. Well, it puts more strain on the ligaments and on the joints, and arthritic changes of the joints are much more common in overweight people than they are underweight people or normal.

(Testimony of C. Elmer Carlson.)

Q. Did you notice a condition of arthritis in the patient's low back? [112] A. Yes.

Q. When did you first notice it?

A. Well, that was noticed in the first X-rays that I took in January, 1953.

Q. How does that manifest itself in the low back with reference to pain or disability?

A. Well, it varies a great deal in different individuals. It usually indicates roughness of the joint, and, therefore, the joints do not stand as much strain as they would otherwise.

Q. Following the fusion, Doctor, did you continue to check the progress of Mr. Reiner?

A. Yes.

Q. Did you take X-rays after the fusion?

A. Yes, my last X-rays were taken on March 16, 1956, or—yes, '56.

Q. At that time, what, if anything, did the X-rays portray?

A. The X-rays indicated to me a solid fusion.

Q. Now, Doctor, does that mean bony union?

A. Yes.

Q. Doctor, would you take the X-rays there that the Clerk is going to hand you and pick out the X-rays that you took the first time that you saw this man, and we will have them in the view box. I would like to ask you a preliminary question. These X-rays that are being handed you, Doctor, [113] were taken under your supervision?

A. Yes, sir.

Q. And at your direction? A. Yes, sir.

(Testimony of C. Elmer Carlson.)

Mr. Gearin: We will offer them in evidence.

The Court: They are numbered?

Mr. Rerat: What are the numbers, your Honor?

The Clerk: 33-A through -K.

The Court: Is there any objection?

Mr. Rerat: No objection.

The Court: Received in evidence.

(Thereupon, X-rays previously marked Defendant's Exhibits 33-A through -K, inclusive, for identification, were received in evidence.)

The Witness: Are these in the same order that they were in the envelope?

Mr. Gearin: I tried to get them that way, Doctor.

The Witness: These pictures are always taken in threes, but the one that is really the most significant is the smaller picture and the side view. X-rays are shadow pictures. They are shadows of bones, and from a side view the vertebrae appear rectangular. The vertebrae appear rectangular. They are rectangular shadows. When we come up here to this level, we see a little roughening up here [114] (indicating), and that is what we call arthritis. We are particularly interested in this lower joint. In order to get a direct view of that we take another picture and see the whole spaces here. This space is wide; this space is wide; and this space is very narrow.

Q. Now, the last photograph that you have there, Doctor, bears what number, please, in the view box? A. This?

(Testimony of C. Elmer Carlson.)

Q. Yes, sir. A. 33-A.

Q. Doctor, would you take one of the photographs which you took, X-ray photographs, after the fusion, say, the last photograph that you took?

A. These are not in the same order that they were. This is 1955. Were there any more in that envelope? This is one right here.

The Court: That is Exhibit—

The Witness: Just a second here, there should be a small one to fit that. Is there another small one in that envelope? No, those are not the ones.

Q. (By Mr. Gearin): Now that number, please, Doctor, is what? A. 33-J.

Q. What does the X-ray picture portray?

A. Well, this shows the same joint that I showed just a [115] minute ago. This is still narrowed here, and now you can see a mass of bone in the back here. The way this fusion is done is to—we don't operate right in the, into the joints. The operation is done in the back and the back portion of the vertebrae, what we call the spinous process and the lamina, the structures in the back. They are fused. A bed is prepared, and then bone is removed from another part of the body over here on the crest of the hip bone, and that is used as fusion material. It is packed in there, and finally that grows together. See, there, right there between this bone and this bone, this piece. This is still narrow. You do not touch that part. There is no need to. (Indicating on X-ray.)

Q. Doctor, from your treatment and examina-

(Testimony of C. Elmer Carlson.)

tion, did you have an opinion after the fusion whether or not the man could return to work?

A. The last time that I saw him——

The Court: The question is did you have an opinion, Doctor?

The Witness: Yes, sir.

Q. (By Mr. Gearin): What was your opinion?

A. Well, I thought that he could return to work, and I thought that he was grossly overweight, with the complaint of these knees and so on so I thought he should go back and see his medical doctor and have an examination and see if [116] there was anything he could do for him. That is the last that I saw of him.

Q. With specific reference to the back.

A. I thought he would be able to return to work the last time I saw him, in answer to that question.

Q. At the time of your last examination, Doctor, what was his condition with regard to an unstable low back compared with, say, the last time you saw him before this accident of February of 1955?

A. Well, he had had the benefit of a fusion operation to stabilize that joint, which he had not had before.

Q. Did that improve the situation, make it stable, or what is the effect of a fusion operation?

A. That is the effect of it, to make it stable.

Q. What is the effect of such stability with reference to any pain or disability which exists by reason of prior instability?

A. So far as that particular joint is concerned,

(Testimony of C. Elmer Carlson.)

it stabilizes the joint and should remove the pain there.

Q. Now, was there any movement at the fusion site at any time that you examined this man?

A. No.

Q. I was wondering if the Clerk would hand to Dr. Carlson X-rays that were taken at the direction of Dr. Montgomery. Have you seen those X-rays here during the noon hour, Doctor? [117]

A. Yes, sir.

The Court: They will be Exhibit 12-A, -B, and so forth, Mr. Clerk.

(Group of X-rays marked Defendant's Exhibits 12-A, -B, -C, -D, -E, and -F.)

Q. (By Mr. Gearin): Doctor, what do they call it when they bend forward?

A. That is called flexion.

Q. What is it when they bend backwards?

A. That is called extension.

Q. By taking an X-ray picture of flexion and extension at the site of a fusion, can you determine by the X-ray pictures superimposed, one upon the other, whether or not there is any motion joint site, in the fusion situs?

A. Yes, you can. That is the reason that the pictures are taken, and, of course, if they superimpose perfectly we then feel that there is no motion there.

Q. Take the pictures of flexion and extension taken by Dr. Montgomery, superimpose one upon

(Testimony of C. Elmer Carlson.)

the other in front of the view box, and tell us what, if anything, you find with respect to any mobility in the joint. Will you call the number out, please, Doctor, as you use these?

A. 12-C, these are similar projections to which we just were looking at in the other pictures. This is marked "flexion." It was taken when the patient was bent this way. [118] This one is marked "extension," which was taken when the back was this way (indicating). Now, the operation involves only one joint, just the last joint, the lumbo-sacral joint, this one right here, and if we start in with that——

The Court: Now you are in the act of superimposing one exhibit on top of another. Tell us which exhibit is which now.

The Witness: I am superimposing 12-B and 12-C. Now those are superimposed, I believe, as accurately as it is possible for them to be. This is the shadow of the sacrum. This is the shadow of the fifth lumbar, and I am unable to tell that there is any difference, that is, there is no overlapping of shadows. When you go up above here, there is overlapping of shadows where the joints are normal and where there would naturally be some motion.

Q. (By Mr. Gearin): Did you fuse other joints other than L-5 and -6? A. Just the one.

Q. Then, Doctor, if you will resume the stand. Doctor, the fusion which you performed was necessitated by what? What caused you to perform the fusion operation?

(Testimony of C. Elmer Carlson.)

A. Painful, what we call a lumbo-sacral joint. It is the last joint.

Q. Is that a condition that you treated him for in 1953?

A. I examined him in 1953. I didn't operate until 1955. [119]

Q. But the condition that you found in 1953 was the painful joint?

A. He had a painful joint then, too, yes.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Rerat:

Q. Doctor, as I understand it, you were working along with Dr. Mundal on this matter; is that correct?

A. That's right.

Q. Who is Dr. Mundal?

A. Dr. Mundal is a company doctor with the Northern Pacific Company.

Q. Northern Pacific Terminal; is that correct?

A. Company doctor.

Q. Company doctor.

A. Yes, he does work for the Northern Pacific. He does not limit his work to that, of course.

Q. When you saw him in 1955 did you know at that time that he was released by the doctor and that he went back to work, had no more trouble from that time up until the time of the accident on February 6, 1955?

A. Well, I have no record of his work records.

(Testimony of C. Elmer Carlson.)

Q. Yes. Doctor, in 1955 then you saw him again; is that correct? A. That's right. [120]

Q. In February, I think you said the 17th of February? A. 17th of February.

Q. Doctor, could I see your notes that you have been referring to, please? A. Yes, sir.

Q. I have never seen them.

The Court: Those are Exhibit 32 for identification.

Mr. Rerat: Yes; thank you.

Q. Doctor, I want to ask you a few more questions about February 17, 1955. Would you rather have your notes when I am asking these questions?

A. All right.

Q. All right, I may want them again. Doctor, on February 17th of 1955 you had a history of this man being involved in an accident on February 6, 1955; is that correct? A. Yes, sir.

Q. Doctor, you made an examination of him at that time to determine what injuries that he was suffering from; is that correct?

A. That's right.

Q. You found at that time that he was suffering from an injury to the left leg?

A. That's right.

Q. Doctor, what was the condition of the left leg at that time when you saw him? [121]

A. Well, he told me that he had had a lot of swelling there, and when I had saw him he had been on crutches for two days. You see, I didn't see him until eleven days after the accident happened.

(Testimony of C. Elmer Carlson.)

Q. Yes, that's right.

A. And he was bearing part of his weight on his left leg. His knee-joint motion was good. There was some tenderness on the outer aspect of the leg below the knee, and he complained of a little pain under the arch of the left foot. Now, that is in relation to the leg, that is what you are asking about now?

Q. Yes, and in your opinion, Doctor, were the injuries that he suffered in this accident that you saw at the time of your examination on February 17, 1955, were they all to the soft parts and the muscles and ligaments?

A. Well, the X-rays show not any indication of any breaks or dislocations.

Q. So the injuries then would be to the soft parts? A. That's right.

Q. Now Doctor, you also found, did you not, that at that time he was suffering from a strain of the sacral joint; did you not?

A. I have a note here that when I examined, I examined his back as well as his leg, and he was complaining of a little irritability at this lumbo-sacral level which was the joint [122] that we have been talking about.

Q. Doctor, what was your diagnosis at that time as to what injuries he was suffering from as far as his back was concerned?

A. He had had a sprain of this joint, and he had had contusion of the leg below the knee.

Q. Doctor, you felt at that time that as a result

(Testimony of C. Elmer Carlson.)

of this accident that he had a sprain of the lumbo-sacral joint; is that correct?

A. That's right.

Q. Yes, and that was indicated, Doctor, by what on your physical examination?

A. Well, I have no definite notes except that we put them through certain motions, and I have a note here that my orthopedic examination reveals a little irritability at the lumbo-sacral level.

Q. Then, Doctor, did you find any other injuries that he was suffering from at that time besides the sprain of the lumbo-sacral region, the left leg injury?

A. And he had a sprain of the ligaments of the foot.

Q. That was the right or the left foot?

A. Left.

Q. Left foot. Doctor, when you speak of a sprain of the lumbo-sacral region you speak also, do you not, of the injury to the muscles and ligaments surrounding those various bones [123] at that particular region?

A. Principally the ligaments. That is what a sprain is.

Q. That was eleven days after the accident that you saw him, I thought you said?

A. That's right.

Q. Then, Doctor, you saw him again when?

A. The next time was on March 31st.

Q. Doctor, after determining that he was suffering from a lumbo-sacral sprain of the lower part

(Testimony of C. Elmer Carlson.)

of the back, what treatment did you prescribe at that time?

A. Well, he was complaining more of his knee at that time. There was no specific treatment for his back at that time.

Q. Then you saw him again, Doctor, in March?

A. That's right.

Q. Yes, and where did you see him in March?

A. Where did I see him?

Q. At your office or at the hospital?

A. At the office.

Q. At the office, and at that time did you examine him to determine how the sprain of the lumbo-sacral region was progressing?

A. I did.

Q. What did you find was the prognosis at that time?

A. Well, at that time he was continuing to wear a belt, and he had some, he had irritability at this same joint on [124] putting him through the usual tests, and I thought at that time because he was having some little pain in the back of his leg that it would be better to put him at rest and put weights on him, put traction on him, which was done.

Q. Doctor, you advised with Dr. Mundal, did you not, that he be sent to the Good Samaritan Hospital?

A. That's right.

Q. He was there from March 31st until some time in April?

A. April 13th.

Q. During that time was he under your care and Dr. Mundal's care?

A. Yes.

(Testimony of C. Elmer Carlson.)

Q. Doctor, while he was there his treatment was what you medical men refer to as traction?

A. That's right.

Q. And they are apparatuses put over the legs and weights that come down over the legs so as to try to stretch the muscles; is that the purpose of putting traction on?

A. The purpose of putting traction on is to separate the joints a little bit, pull them apart a little bit, and in 1953 when he was——

Q. 1955?

A. 1955. At any rate, when this was done we were using traction in which the apparatus is put on the legs, straps are put along both sides of both legs, and then the pulley [125] is attached to the bottom of that with a weight so that there is a continuous pull on the legs. We do not use that method so much any more. There is another method that works a little better in which we put a girdle around the pelvis and pull directly on the girdle. It does the same thing, but it is a little easier on the patient because they do not have to have their legs tied up.

Q. But it was that method?

A. Yes, it is the method, it is the traction method no matter how you do it.

Q. Doctor, after he was discharged from the hospital did he remain still under Dr. Mundal's care, as far as you know? A. He did.

Q. Then you had occasion to see him when?

A. Well, I saw him in May of 1955 again.

Q. Then you saw him in October of '55?

(Testimony of C. Elmer Carlson.)

A. Yes, he was wearing a better corset and said the pain was really all gone. Those were his notes as far as his back was concerned. He was principally concerned about his knee, and so I injected the knee again with hydrocoritan and that again gave him relief.

Q. Then you saw him again several months later; did you not?

A. Yes, I saw him in August; yes, sir.

Q. At that time you advised him to go to the hospital for a fusion operation? [126]

A. Well, not right then. I saw him a time or two after that, and then later I advised him to go to the hospital for a fusion operation.

Q. Could I see your notes just at that point?

(Document handed to counsel.)

Q. Do you want to refer to your notes again, Doctor? I just want to ask you about the operation.

(Document presented to the witness.)

Q. Who performed this fusion operation, Doctor, besides yourself—Dr. Mundal? A. No.

Q. It was just you?

A. I performed the operation. I have an associate who works with me.

Q. He works with you all the time; does he not?

Mr. Gearin: That is just a nodding answer. I think the Court wants to hear the answer.

Q. (By Mr. Rerat): Let me ask you this, Doctor. Did Dr. Mundal work with you?

(Testimony of C. Elmer Carlson.)

A. No, sir.

Q. Was he with you when the operation was performed in this case?

A. I don't believe that he was. Dr. Mundal does not do surgery.

Q. I see. After you had completed the fusion operation, [127] then you put this solid plaster of Paris cast on his back; is that correct?

A. That's right, put it around his body.

Q. Well, that extended from right about the armpits down to the hips? A. Yes, sir.

Q. He was in the body cast for how long a period of time?

A. Well, the cast—we don't put a cast on immediately. We have to wait until the incisions heal. There are two incisions that heal in about two weeks. The cast was applied on October 21st, and he wore this cast until January 6, 1956.

Q. Then you took it off that time?

A. Yes.

Q. Doctor, you have not made an examination of him or have been requested to since then?

A. I did not understand the question.

Q. I say, have you been requested to make an examination of the plaintiff since, I believe, since April of 1956?

A. No, I have not been asked.

Q. It is the last time you made an examination?

A. That's the last time I have seen him.

Q. To treat him; is that correct?

A. That is correct.

Mr. Rerat: That is all.

Mr. Gearin: Thank you, Doctor.

Mr. Rerat: Thank you, Doctor. [128]

The Court: Please step down.

(Witness excused.)

The Court: Your next witness?

Mr. Gearin: Defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Rerat: May we just have a minute. I will call Mr. Reiner for just a question.

FRANK REINER

plaintiff, recalled for rebuttal testimony, was examined and testified as follows:

Direct Examination

By Mr. Rerat:

Q. Mr. Reiner, you were in court and saw some motion pictures which were taken by the defendant of you this morning? A. Yes, sir.

Q. In one of the pictures it showed that the hood of your car was up? A. Yes, sir.

Q. Will you tell us what caused the hood of your car to be up?

A. I went shopping to Fred Meyers on 39th Street, and there is a building that is—you drive right in the building, leave your car and then you go in, do your shopping. When I come out of there, I was in there approximately 15 minutes, I guess, anyway, and proceeded to get in my car, and it [146] started jerking. I didn't know what was

(Testimony of Frank Reiner.)

the matter. It was practically a new car, and I never had any trouble with it. I knew there was something wrong, and I couldn't figure out what it was. It's an eight cylinder Ford Ranch Wagon. So anyway it was bad weather. Being I am not too good on getting around outside like that, and so I had kept it and I had drove at the Safeway which has a store on 39th and Powell and so I drove up just an instant, and I stopped. I knew there was something wrong with the car because it was just jumping and jerking all the time, and so I opened up the hood on my car, which if you just press it down there, a five-year-old child, the hood just gave right there. Then you can get hold of it, and there is springs there, goes up. Meanwhile, there was a couple guys come out of the store, and I didn't know what was the matter, but I left my motor run, and you could see that one of the wires—these are a kind of wires that is riveted on, they are hard to come off. They won't come off by themselves. One of these wires was laying against the motor, and you could see the spark flying there on that.

So there was a man come out, which you seen in the picture, and he had a bundle in his arm. He come up, he says, "What is the matter?" He says, "Oh, I see your trouble right there." He says, "You have got a short. Your wire is off of there." So I stepped around to that [147] side and saw another one off on the other side and more in a complicated place so I told the man, I says, I can't—I shut the motor off. I can't get in there to put that back on there. You have to stoop to get down in there. That

(Testimony of Frank Reiner.)

is what they figured on probably getting, a pretty good picture, but I didn't do it. The man that was there, he put the wire on there, and he also put the other wire on there.

Mr. Rerat: That is all.

Mr. Gearin: I have no questions.

The Court: You may step down.

(Witness excused.)

Mr. Rerat: Your Honor, the plaintiff would like to offer in evidence the amendment to the original Complaint that was filed.

The Court: The amendment will be—comprising part of Exhibit 30 heretofore received in evidence as part of the Complaint.

Mr. Gearin: Yes, your Honor.

The Court: The supplement to the Complaint. Mr. Clerk, will you have it so marked? The supplement will be Exhibit 30-A in evidence.

(Document above referred to was thereupon marked Plaintiff's Exhibit 30-A for identification and received in evidence.) [148]

Mr. Rerat: Plaintiff rests, your Honor.

Mr. Gearin: No further rebuttal. [149]

CLOSING ARGUMENT

Mr. Gearin: I can understand why they brought Mr. Rerat back here from Minneapolis because he certainly makes a beautiful argument to you people. I am going to talk very briefly without the aid of

anything but asking you to recall what the evidence is in this case.

I am going to talk first about liability and about the participation of Mr. Reiner in this accident. Counsel says that he did not know what was going on; he didn't know what they were going to do. Well, is that true?

The plaintiff, Mr. Reiner, said that he knew they were going to go back. He admits so stating at the time of the hearing to which his attention was directed. Mr. Moore told him so, and Mr. Bray says he recalls it.

Now, you may want to believe counsel that those who work for the railroad tell the truth and those who do not do not or vice versa, but the plaintiff himself admitted stating shortly after the accident that he knew that they were going to back up.

Contributory negligence is what I am talking about when I talk about the participation of Mr. Reiner in this movement. By contributory negligence, that means what did he do that was wrong. I am going to tell you what, in our opinion, he did that was wrong, and then I am going to tell you a little bit later the evidence in support of it. [150]

My little talk to you this afternoon is going to be rather disjointed because I have to answer Mr. Rerat. I don't know what to say until he gets through, and so I have to go along with what he has to say.

First of all, we charge him with failure to keep a lookout, and what is the evidence on that? The evi-

dence is this. I asked Mr. Reiner, "Did you look out at all?" He said, "No." He failed to turn on the windshield wipers, and they were there. He said he couldn't see out, but Mr. Moore could see out. When he turned the headlight on bright before, Mr. Reiner told him to turn it on dim. He failed to stop the train by using the emergency bell. He failed to warn the engineer.

You might say that he had nothing to do with this at all, but the buzzer was there, and he had used it before. Now regardless of all the testimony brought in by the other witnesses of the plaintiff that Mr. Reiner had nothing to do with and couldn't handle a single gadget, he admitted that he had used the buzzer before, and Mr. Bray had seen him use it.

He failed to assume control, and I will come to his duties in a moment. He directed the hostler-helper—that is Mr. Moore—to turn the big headlight from bright to dim, and both Mr. Bray and Mr. Moore say that is true. [151]

He jumped from the diesel unit when there was no justification or excuse therefor.

Outside of being maybe shaken up, Mr. Bray and Mr. Moore were not hurt in the accident. Mr. Reiner was hurt when he jumped, and he was not hurt in the collision.

I refer you to the statement that was obtained from him, which bears the witnessing signature of his Brotherhood representative, and Mr. Reiner did not tell you that there was one single sentence in there that was not true, and it is right in here, "I got hurt when I jumped."

There are two complaints in this case, one of an earlier case and the present case, and both of them have been verified under oath, and Mr. Reiner makes the allegations in each one of those that he jumped and he got hurt when he jumped.

“I was following the provisions of Rules 106 and 108.” You have the rule book. You determine that. We charge that he failed to turn the bright beam of the rear headlight of the diesel unit. That is the same thing as to tell him to turn it on dim.

Counsel has made heated references to the Federal Employers Liability Act. All that means is that if a railroad negligently causes a man to be hurt they ought to pay him for damages, that is all, and there isn't anything different than that. It does not mean that we owe everything. It [152] doesn't mean that we owe these fantastic claims that have been built up by two times two equals four, times a hundred, and then you can come out with any kind of figures, as much as you want. It means if the railroad causes a man to be hurt they compensate him for his injuries. If he participates in it, his injuries and damages are depreciated, cut down, to the extent of his participation, and that is all that it means.

Another facet of counsel's argument about he “didn't see the red and the green light of the switch stand,” these are the facts because Mr. Reiner said so, and I will take his word for it because I think he is the only one who testified to it, that they stopped twelve to fourteen car lengths back over from the accident point. Then we know that the train crossed.

Then we know that they started up on the backward movement. They were down there four of five minutes. Do you recall that, and I asked Mr. Reiner how long. Then I refreshed his memory, and he said maybe four or five minutes, maybe less. Then they started up, and they make the accusation that that light was red or green or whatever it was, and they should have seen it, but Mr. Reiner didn't even look because I asked him, "Did you look, keep a look-out?" He said, "No."

Moore is accused of not having any instructions about telling Mr. Reiner what was going on. The engineer told him [153] what to do. He went up there, and he told Mr. Reiner what the movement was going to be, which fact Mr. Reiner admitted, and he said, "He didn't have to tell me. He knew I would do it."

The impassioned plea is also made again that Mr. Reiner cannot work. Now, these are the facts, that after 35 years of service with the company he has taken his pension. He has his house trailer, and he loves to go hunting and fishing in the outdoors. Certainly, that is a laudable purpose, and that is something perhaps every man would like to do, but the incentive for his working is gone. He can do now what he wants to do, and the evidence of this case is that he has done that. He has gone deer hunting, and it is not a spur of the moment thing because in last March he got his hunting license, and he fishes regularly in the fishing derby and the salmon derby. Those of you who have ever caught a

salmon, you may know that a person with a bad back cannot fight and land a 31-pound salmon.

We are criticized because we did not call the engineer. Mr. Rerat has subpoena power. Certainly, he could go down and get any employee of the Terminal Company he wants, and he got some others, none on the train crew, none who were there at the time with the exception of one fellow that was on the other train. Doesn't that sword cut both ways? [154] If he wanted the engineer, he could have had him here if he was available, and he knows why he was not called as well as I do.

Now, about Dr. Mundal, he was not called because he is not a surgeon, and he did not perform the operation, that is why, and if Dr. Mundal had anything to say different that Dr. McMurray they certainly would have had him here.

They talk about the man's heavy work, but bear in mind this, that Dr. Carlson in 1953 knew that he had this back, and he told you that with that back as it was in 1953 he was bound to have trouble with it.

Here is another thing. The plaintiff told Dr. Carlson that he had hurt his back lifting something and that his back had been bothering him, and did Mr. Reiner deny that? Did he say, "No, I didn't tell Dr. Carlson that I had hurt my back?" No, because it was true. This man had a back that had been bothering him for a long time, and he was operated on it—and what he was operated on for was the same thing that he had been bothered with before, and that was that unstable vertebra which Dr. Carl-

son pointed out on the X-ray and said, "Here it is," and that, "I would think, assume, and have an opinion that that back as it was then would have given him trouble if he had gone on doing heavy work." [155]

What is the responsibility of the plaintiff in this movement? His obligation was to protect the end. He had an obligation to exercise, and as even one of the witnesses that were called against us said, he pilots the train. What did he do? He did nothing whatsoever. He didn't even look out to see what was down there.

Now, we have seen in this case claims for large sums of money. We have seen in this case claims for all the experts. We have seen claims for injury, and whether or not those claims are made in good faith, whether they are really sincere, let me read from a complaint filed in this court on April 4, 1956, which Exhibit No. 31. I am reading Paragraph 7:

"That in an effort to relieve and heal himself of said injuries plaintiff has been compelled to expend a considerable sum of money for medical, hospital, nursing care, etc., and in the future will be compelled to spend a considerable sum of money for said purposes, the exact amount of which cannot be definitely determined at this time."

Again in another complaint filed in this court in October 31, 1956, we have this language, the same thing, that he has expended considerable sums of money, which is absolutely not true at all. There is no testimony in this case that Mr. Reiner at any time has paid or has become obligated to pay for

any treatment that he has ever received, [156] even going back to 1953.

Now, is that—do they come before you here with a legitimate? “I sprained my back when I jumped.” How much is that worth?

Now, another thing, and I am going to talk to you a little about, a little bit more about that because I know Mr. Rerat is probably waiting for me to comment about it, and that is this: We are going to be criticized because we had motion pictures taken of Mr. Reiner. We are going to be criticized for that. I am going to say to you that the reason it was done was to fight fire with fire, to protect ourselves so that this matter could be fairly and honestly above-board placed in front of you and each one of you twelve people see what the net result is, what the score is going to be; fight fire with fire.

Is there some reason why we have had one, two lawyers from Minneapolis, one from Seattle, one from Portland trying this case for the plaintiff with large photographs, aerial views, blown-up things like those claims in a complaint for considerable sums of money, for doctor and hospital bills when there is no justification or reason for it?

Mr. Rerat: Just a minute, Counsel. I want to object to such testimony on the grounds it is prejudicial, your Honor, and ask that the Jury be instructed to disregard it.

The Court: Proceed. [157]

Mr. Gearin: Now, you note the drawing of the tracks is given. Why is it that this case has to be built up in that manner with two aerial photographs

which we all know they don't come by easily. Can't we have a photograph of the wreck out there? Why do we have to have one of this big—they are exaggerated, you can see.

Now, I am going to talk very briefly about Dr. McMurray. Sometimes these things slip, and one of them is this. You recall Dr. McMurray said that when the plaintiff came in his office he walked perfectly. He used the word, something about ambulatory. Do you recall that? And he said he walked perfectly. Has the plaintiff today, has the plaintiff yesterday walked perfectly? Has he walked in the same manner as he walked in the motion pictures that were shown to you that were taken a few weeks ago on the times when we had the photographer-investigator go out?

About Dr. McMurray. They say why didn't—we didn't know until yesterday until I asked Mr. Reiner who he had been to for examination that they sent him all the way up to Seattle to have a doctor examine him there, just look at him, not treat him. Does that indicate that perhaps this is an idea, some idea to build this thing up to proportions which it does not deserve? [158]

Dr. Cohen, Dr. Grossman, and who else, and it was not until last week by shopping around they finally found a doctor who would come before this jury and say this man is hurt. That is why, and I think the obligation is upon Mr. Rerat to explain to the Jury why they had to shop around to find a doctor when they didn't call the one in Seattle, they

didn't call the second one, they didn't call the third one, and; finally, only last week did they find one.

Dr. McMurray told you that there was movement, and he says you could detect it by superimposing the radiographs one upon the other. Did Dr. McMurray compare those pictures, set it up and said, "We will take one and we will put it on top of the other, and we will show you what I mean that there is a movement"? Now, he didn't, but Dr. Carlson did, and you will have those X-rays with you. You take a look at them and see which doctor's testimony is worthy of belief. If Dr. McMurray could have demonstrated in those X-rays any movement in that man's low back, he would have done so. He preferred not to do so. He didn't want to put one on top of the other because it would prove to the contrary. Dr. Carlson did so.

What is involved in this case? It involves a case where one train's rearend backs and runs into another train. Somebody certainly was off base. Somebody certainly made a mistake here. They were doing something they should not [159] have done, but Mr. Reiner was the one who was piloting. He pilots trains. That's what they say. He was back there. He was in charge, according to Mr. Moore. They were back there talking. He should bear the responsibility of his failure to look out, for his failure to guard the rear end, failure to act as a reasonably prudent person. He is in it as well as anybody else.

Now, so far as injuries are concerned, we have this situation: We have a man who two years before the

accident had got a bad back. That is not disputed. He had something. The doctor would think that he probably would have trouble in the future. He was wearing a brace, and he had worn it for a long time. This is before the accident. All right, what happened? In the accident it flared up. Of course, he jumped and probably hurt his back at the time, but when he got through he had nothing more than what he had when he started, and that was the net result of the operation. Dr. Carlson told you that he anticipated the man could go back to doing the kind of work he could do before if his back had been stabilized, after his back was stabilized, and why did he stabilize that back, fuse it? It is to prevent the motion which made it unstable. It was unstable before this accident.

I have perhaps talked too long. I have tried not to. You have been on juries for a long period of times. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people [160] who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think in fairness that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you.

[Endorsed]: Filed February 21, 1957. [161]

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Oct. 31—Filed complaint.

Oct. 31—Issued summons to marshal.

Nov. 5—Filed summons with marshal's return.

Nov. 7—Filed answer.

Dec. 3—Entered order setting for trial on Jan. 22,
1957.

1957

Jan. 16—Entered order cancelling trial date of Jan.
22nd and resetting to Jan. 21st and as-
signing to Judge Mathes.

Jan. 18—Issued subpoena and 4 copies to attorneys
for plaintiff.

Jan. 18—Filed petition for subpoena duces tecum.

Jan. 18—Filed and entered order for subpoena
duces tecum. Issued to marshal.

Jan. 21—Issued subpoena and 2 copies to attorneys
for defendant.

Jan. 21—Filed supplement to complaint.

Jan. 18—Pretrial conf. had. Order allowing special
admission of Eugene Rerat for this case.

Jan. 18—Entered order allowing plaintiff's motion
to amend complaint.

Jan. 21—Jury empaneled and sworn. Record of
jury trial, evidence adduced. Entered
order denying plaintiff's motion to strike
portion of oral testimony.

Jan. 22—Record of further jury trial. Evidence ad-
duced.

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- Jan. 23—Record of further jury trial. Jury instructed and retire at 10:17 a.m. Entered order that the court's instructions be filed and sent to the jury. Entered order for jury meals. Jury returns with verdict 3:32 p.m. Entered order to file and enter verdict as returned for defendant and to enter judgment on the verdict with costs to defendant.
- Jan. 23—Filed jury's request for court's instructions.
- Jan. 23—Filed court's instructions.
- Jan. 23—Filed and entered verdict for deft.
- Jan. 23—Entered judgment on the verdict with costs for deft.
- Jan. 30—Filed motion for new trial.
- Feb. 11—Entered order setting hearing on ptff's motion for a new trial for Feb. 21, 1957, 10:00 a.m.
- Feb. 21—Filed partial transcript.
- Feb. 21—Record of hearing on motion for new trial. Motion taken under advisement. Entered order allowing pltf. 15 days in which to file memo from date of receiving completed transcript and allowing deft. 10 days thereafter.
- May 31—Filed plaintiff's memorandum in support of motion for new trial.
- May 31—Filed reporter's partial transcript.
- June 14—Mailed file and reporter's transcript to Judge Mathes.

1957

- June 12—Filed brief of Northern Pacific Terminal Co.
- June 24—Filed and entered order denying ptffs. motion for a new trial and ordering Clerk to mail copies of order to attorneys.
- July 16—Filed notice of appeal.
- July 16—Filed cost bond on appeal.
- July 16—Filed plaintiff's designation of contents of record.
- July 16—Filed plaintiff's statements of points.
- July 16—Filed motion for transmittal of original exhibits.
- July 16—Filed appellee's designation of additional portions of record, etc.
- July 17—Filed affidavit of service of notice of appeal, etc.
- July 25—Filed and entered order for transfer of Exhibits Nos. 1, 5, 13, 21.
-

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Supplemental complaint; Motion to strike portion of oral testimony of Frank Reiner, etc.; Verdict; Order to enter verdict as returned for defendant and Order to enter judgment on the verdict for defendant with costs; Motion for new

trial; Order on plaintiff's motion for a new trial; Notice of appeal; Cost bond on appeal; Plaintiff's statement of points; Plaintiff's designation of contents of record on appeal; Appellee's designation of additional portions of the record, etc.; Order for transmittal of original exhibits and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8874, in which Frank Reiner is the plaintiff and appellant and Northern Pacific Terminal Company of Oregon is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of this court.

I further certify that the reporter's transcript of proceedings will be forwarded at a later date. All exhibits are being forwarded by O'Neill Transfer Company.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 9th day of August, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15677. United States Court of Appeals for the Ninth Circuit. Frank Reiner, Appellant, vs. Northern Pacific Terminal Company of Oregon, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed August 10, 1957.

Docketed August 21, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15677

United States
Court of Appeals
For the Ninth Circuit

FRANK REINER,

Appellant,

vs.

NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON, a Corporation,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK

No. 15677

United States
Court of Appeals
For the Ninth Circuit

FRANK REINER,

Appellant,

vs.

NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON, a Corporation,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

(All parties having rested, the following proceedings were had:)

The Court: We will take a brief recess at this time, Ladies and Gentlemen of the Jury. You are excused, subject to call and subject to the admonition heretofore given you.

(The jury having retired for a recess, the following proceedings were had:)

The Court: Is it stipulated, Gentlemen, the jury have retired from the courtroom?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: Yes, sir.

The Court: Have you gentlemen had an opportunity to look over the suggested instructions in the case?

Mr. Gearin: Yes, sir.

Mr. Rerat: We have two additional instructions, your Honor, that we would like to submit.

The Court: Have you looked over the Court's proposed instructions?

Mr. Rerat: Yes, your Honor, I have.

The Court: Do you still have two more to offer?

Mr. Rerat: Yes.

The Court: You may hand them to the Clerk. Did you serve Counsel with these?

Mr. Rerat: I shall. [2*]

(Documents presented to Mr. Gearin.)

The Court: Is this instruction about the failure to call a doctor, is that required by the law of Oregon?

Mr. Gearin: There is some mention in it in that Frangos case, your Honor, but I do not think that under the Federal Liability Act that the rule is strict. I would like the opportunity to comment. In the rules with regard to F.E.L.A. cases they are not strict or stringent, but the rule appears, as I understand it, that most anything goes, and I think I should be entitled to comment in the same way that the plaintiff could comment on our failure to call Dr. Mundal.

Mr. Rerat: Well, your Honor, I do not believe for that case—I think there should be some limitation.

The Court: I do not know whether these doctors are available or not. You are asking me to instruct the jury that the doctor is available for both sides. So far as I know, he may be dead. The record does not show where he is, but even if the record did show I would not be inclined to give that instruction unless I was compelled to do so by precedent.

Mr. Gearin: Well, that is the point, is that they would be equally available to either side. Furthermore, I didn't know about it until yesterday when I got him on cross-examination, just whom he had been to.

The Court: Rule 51, as you gentlemen know, provides: [3]

“At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the

law as set forth in the requests. The Court shall inform Counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

I have asked the Clerk earlier to give you a copy of the Court’s proposed instructions as notice of my intended action upon your respective requests. Before the arguments to the jury are made, I would be glad to hear any suggestions with respect to the proposed instructions, and, of course, those that are not made to your satisfaction at the time the instructions are given, why, you may object to in the usual way before the jury retires.

The Court first would be glad to eliminate any that [4] you think we can eliminate. Brevity is always a desirable goal. Have you had an opportunity to go over them, Mr. Rerat?

Mr. Rerat: Yes, I have, your Honor.

The Court: Do you have any suggestions?

Mr. Rerat: I think generally that they cover the points very, very well. The only thing I was thinking about, and I may be in error about this, when we were discussing the instructions the other

day, or yesterday, your Honor, I thought that—that would be on, let's see, Page 31 of your Honor's instructions—rather than have all of the specific acts of negligence stated in the instructions on either side, I thought that at least your Honor was going to give consideration to just having the general instruction as to negligence and not designate each one. Now, I may be in error about that.

The Court: I am always glad to do that, Mr. Rerat, if Counsel do not ask for the jury to be advised as to their respective contentions.

Mr. Rerat: How do you feel about that? (To Mr. Gearin.)

Mr. Gearin: Well, if you are going to put his in, put mine in.

Mr. Rerat: That's right.

Mr. Gearin: I would just as soon go along and leave them all out because we can argue anyhow. Is that all right?

The Court: That will save a great deal of time if you gentlemen can agree upon it, and we can eliminate then—— [5]

Mr. Gearin: 27.

The Court: 27 and 31.

Mr. Rerat: 27 and 31, your Honor.

The Court: Very well; the record may show, and the Reporter will copy into the record at this juncture the Court's suggested Instructions 27 and 31 to show what has been eliminated by agreement of the parties.

(Thereupon, pursuant to the Court's instructions above, the following suggested instruc-

tions were deleted from the proposed instructions by the Court.)

“In this case plaintiff contends and alleges that the claimed injuries for which plaintiff seeks recovery were directly and proximately caused or contributed to by the negligence of the defendant, its agents, servants and employes other than the plaintiff as hereinbefore alleged and in one or more of the following additional particulars:

“(a) That the defendant negligently operated and propelled said locomotive in reverse movement on said track at a high and dangerous rate of speed contrary to and in violation of the rules, customs and practices then and there in force and effect. [6]

“(b) That the defendant negligently moved and operated said locomotive in reverse movement without timely or adequate warning to plaintiff of its intentions so to do.

“(c) That the defendant negligently moved said locomotive at a high, dangerous and excessive rate of speed, without having it under control and without keeping a proper lookout and with disregard for the safety of plaintiff.

“(d) That the defendant negligently moved said locomotive on said track in violation of the rules, customs and practices then and there in force and effect.

“(e) That the defendant negligently failed to provide and maintain for plaintiff a reasonably safe place to work.

“(f) That the defendant negligently failed to adopt and enforce a reasonably safe plan and method of performing said work.

“In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant alleges that the plaintiff himself was negligent in that: [7]

“(1) He failed to maintain proper or any lookout.

“(2) He failed to turn on the windshield swipes of the locomotive before the backup movement was begun, or at all.

“(3) He failed to stop the train by the use of the emergency valve.

“(4) He failed to give warning signal to the hostler (engineer).

“(5) He failed to assume control of the backup movement.

“(6) He directed the hostler helper to turn the backing headlight of the diesel unit from bright to dim.

“(7) He jumped from the diesel unit when there was no justification or excuse therefor.

“(8) He violated the provisions of Rules 106 and 108 of the Consolidated Code of Operating Rules and General Instructions.

“(9) He failed to turn on the bright beam of the rear headlight of the diesel unit.

“(10) He failed to turn off the interior domelight of the cab of the diesel unit.

“(11) He failed to lower the cab windows for better visibility. [8]

“(12) He failed to ascertain the nature or extent of the unit movement.”

The Court: Are there any others? That is a good first step. Do you have any others, Mr. Rerat?

Mr. Rerat: I do not have any others right now, your Honor. The only one that I was just thinking about, and I believe probably that it may serve a useful purpose in giving it, is your Honor's instruction in regards to the compensation law of Oregon.

The Court: I will be glad to omit that.

Mr. Gearin: Yes, I wish you would.

The Court: I usually only give that because the plaintiff frequently is disturbed that the jury may be confused. I never have thought there was much merit in the giving of it. It is more likely to confuse than to enlighten them.

Mr. Rerat: We could argue that, your Honor, that it does not come under the State Compensation Act?

The Court: Yes, and the other instructions cover it anyway. The instructions tell them about that.

Mr. Gearin: We set that ground up, your Honor, under the Ninth Circuit, and the plaintiff by the same token—my thinking is I don't want to make comments during the argument, but then they can allege, well, if he doesn't get insurance he doesn't get insurance, he hasn't got any money. That [9] is very prejudicial to us. Your Honor is instructing the jury that if the defendant is guilty of negligence

and that covers the injury, they have to pay for it. All right; now, why drag in everything else, that the man doesn't have workman's compensation and then there is no way—he doesn't have any wood in the furnace this winter. I just don't think we should even mention it.

The Court: We should not have to negate this. Presumably the jury does its duty. The Reporter will copy into the record the Court's suggested Instruction No. 21 by agreement of counsel.

(Thereupon, the following suggested instruction by the Court was eliminated from the Court's proposed instructions:)

“The plaintiff's right to recover as against the defendant railroad company in this case is governed by the provisions of the Federal Employers' Liability Act (45 U.S.C., Paragraphs 51-59). The Workmen's Compensation statute of the State of Oregon is not applicable in any form to this case. Under the Workmen's Compensation statute an employe has a right to recover even though there be no evidence of negligence on the part of the employer. Whereas under the Federal Employers' Liability Act, there can be no recovery without proof of negligence [10] on the part of the employer. Further, under the Workmen's Compensation statute, the amount to be recovered is fixed by statute. Whereas under the Federal Employers' Liability Act, it is the duty of the jury to determine, pursuant to the instructions of the Court, what damages, if any, are to be awarded.”

Mr. Gearin: Your Honor, No. 5 also presumes indirect and direct evidence. I find that a lawyer is sometimes confused and I would suggest that the jury is confused enough by the time we get through the case so that we should omit that instruction.

The Court: Is it No. 6?

Mr. Rerat: That is No. 5, your Honor. I think, as I read it over, I think that should be given.

Mr. Gearin: Then No. 7, your Honor.

The Court: What about No. 5 and 6? Are you in one picture, so to speak, or talking together? The plaintiff feels they should be given; is that true?

Mr. Gearin: Well, when we cannot agree on it we will go to the next one.

The Court: Very well.

Mr. Gearin: No. 7, your Honor, you have already told the jury what the lawyers say is not evidence. I think a [11] statement about judicial notice, the only time that comes in is with regard to mortality tables, and you are giving an instruction on that.

The Court: You suggest eliminating the first two paragraphs?

Mr. Gearin: I suggest omitting the whole of No. 7. This jury has been here several months, your Honor, and I am thinking just merely of getting done.

The Court: Yes, I think several of these jurors have heard me read these before. Do you have any objection, Mr. Rerat?

Mr. Rerat: Yes, your Honor; I think——

The Court: We tell them that mostly when we are empaneling the jury.

Mr. Rerat: I think the first two paragraphs would be all right to eliminate, but I think the last two——

The Court: Well, at least we got half of it out of the way. We will eliminate the first two paragraphs of No. 7. Next?

Mr. Gearin: No. 9.

The Court: Omitted?

Mr. Rerat: I would suggest so.

The Court: No. 10 covers it, doesn't it?

Mr. Gearin: That is correct. That is the only time we have opinion evidence in the case. [12]

Mr. Rerat: To what?

Mr. Gearin: The only time we have opinion evidence in the case is with reference to the doctors.

Mr. Rerat: I have no objection to eliminating 9.

The Court: Very well. We will eliminate Instruction No. 9. The Reporter will copy it into the record.

(Thereupon the following instruction suggested by the Court was omitted from the instructions to be given to the jury:)

“The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons

for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.”

The Court: Is there anything further? [13]

Mr. Gearin: No. 13, your Honor, they know that already, and while it is a matter of no importance I am just thinking the shorter we get these down the more the jury will listen to the instructions that are given.

The Court: That has always been my view.

(Thereupon the following suggested instruction by the Court was eliminated from the instructions to be given to the jury by the Court:)

“You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

“The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.”

The Court: No 14 shall we eliminate?

Mr. Gearin: Does your Honor feel it should be eliminated?

The Court: I do not think it adds anything in particular to an experienced jury. [14]

Mr. Gearin: All right.

The Court: I always like to give all these instructions to a jury that is new, but this jury, I don't know how long they have been serving here.

Mr. Gearin: Since the 1st of December, your Honor.

The Court: 1st of December?

Mr. Gearin: Yes, sir.

The Court: So if there is no objection, we will eliminate 13. The Reporter will copy it into the record.

Mr. Gearin: No. 14.

The Court: 14 is in the same category, I suppose, unless one of you particularly wishes it.

Mr. Gearin: No.

Mr. Rerat: I do not think it helps or hurts, either one.

The Court: Do you agree, Mr. Rerat?

Mr. Rerat: Yes, your Honor.

The Court: Very well; we will eliminate 14.

(Thereupon the following suggested instruction by the Court was eliminated from the instructions to the jury to be read by the Court:)

“The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even [15] though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe that the balance of probability

points to the accuracy and honesty of the one witness.”

Mr. Gearin: Now, we get down to 22, your Honor. I would like to shorten that by about four lines and that is by reference to the defects or insufficiency of cars, engines and appliances. There is no safety appliance act here, your Honor. It is just plain human natures.

The Court: “The negligence,” and stop there.

Mr. Gearin: “The negligence of any officers, agents, or employes of such carrier.”

Mr. Rerat: I think the entire paragraph should be given. That is my experience. It has always been given in its entirety.

Mr. Gearin: My point, your Honor, is that there are lots of things in 45 U.S.C.A., but the only thing we are involved in here is negligence, human negligence of employes. I am sure that there is no charge about any defect, nor is there any evidence about any neglect, defect, insufficiency in machinery, tracks, roadbed——

The Court: Is there any contention except human error?

Mr. Gearin: That is all, your Honor. [16]

The Court: Just eliminate after in Line 15, “employes of such carrier,” and just eliminate the language for the reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves and other equipment.

Mr. Rerat: All right.

The Court: That will save some time.

Mr. Gearin: No. 23, your Honor, is just saying the same thing over again after you have read the statute. It does not add or detract anything. You have read the code to them, said we are liable. There is no question about being a common carrier.

The Court: I think Mr. Rerat will insist on that one.

Mr. Rerat: That's right. I think that should be in there.

Mr. Gearin: Very well. Now, on 25, a reasonably safe place to work, I don't know whether or not that is a charge of negligence, and my memory fails me on that, but certainly there is no evidence in the case that Mr. Reiner's work was fleeting or infrequent.

The Court: I don't suppose it adds anything to 24, does it?

Mr. Gearin: There is no contention on our part that is met by it.

The Court: There is no issue in the case that—do [17] you think 25 adds anything to 24?

Mr. Rerat: I do, your Honor.

The Court: Very well; it will not take long to read.

Mr. Gearin: 26, your Honor, the same reason, there is no issue about assumption of risk. I think to give it would be wrong. The only issue is whether we were negligent, did we cause him injury and how much, taking into consideration his negligence. Assumption of risk is not in the case.

Mr. Rerat: I think that assumption of risk is

a very important part of any case under the Federal Employers' Liability Act because——

The Court: I will give it. Next?

Mr. Gearin: 36.

The Court: That is a long one on payment.

Mr. Gearin: Yes; well, the first three paragraphs have to do with doctor and hospital bills, and while there is a charge that he had to expend a great amount for it there is no evidence that he did.

Mr. Rerat: Well, I think that is true. The company has taken care of the bills.

The Court: All right.

Mr. Rerat: When I say that, I was going to call the Court's attention to it, and so the first three—let's see, your Honor, the first should be out. The second should be out, and the third. [18]

The Court: All right, starting with "Time necessarily lost."

Mr. Rerat: Yes, your Honor; as I take it, it is the lost wages up to the present time, future loss of earnings, if any, and then pain and suffering and injuries.

Mr. Gearin: That's right.

The Court: Very well.

Is there any more we can eliminate?

Mr. Gearin: I do not think so.

The Court: Do you have any further suggestions, Mr. Rerat?

Mr. Rerat: I have none other, your Honor.

The Court: we will take a recess to 3:30 p.m.

(Afternoon Recess taken.)

(Whereupon the jury returned to the jury box, and the following further proceedings were had in the presence and hearing of the jury:)

The Court: Is it stipulated, Gentlemen, the jury is present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: You may open summation on behalf of the plaintiff, Mr. Rerat. [19]

Mr. Rerat: Thank you, your Honor.

May it please the Court, counsel for the railroad company, and you folks who have been selected to hear and try this matter, I want to say at the outset that it becomes my privilege to go over the evidence with you. I shall try to state the evidence as I remember it. Now, in case I should make any mistakes, I am just human, and it will be because I am just one, and probably my memory does not remember it perhaps as good as yours, but I shall try to state the evidence as I remember it. I shall also try to submit fair deductions from the evidence as the evidence warrants.

Now, here you have a man who has worked for a railroad company for 35 years, and he is riding in a double-unit Diesel, traveling on a main-line track where there are not supposed to be any reverse movements made, and when the engineer all of a sudden stops in that movement without any knowledge on the part of the herder and then sends the fireman back with own instructions to see that—

to turn on the light and see whether everything is clear and then give him the buzzer sign to back up, and the herder—and the fireman leaves the sound of the cab and goes back, and he is supposed to have joint operation with the engineer, is supposed to have a duty to perform to see that everything is okeh. When he fails to do that and he acts the way that he did under the circumstances as we know that caused this accident, he is liable for negligence on [20] the part of both the engineer and the fireman. The first question that you ladies and gentlemen will determine is whether there is negligence on the part of any of the employes of the railroad company. Then your second question will be any contributory negligence on the part of the plaintiff.

It is up to the plaintiff to prove negligence on the part of the other employes or some employe by proof by a fair preponderance of the evidence. It is up to the defendant to prove contributory negligence on the part of the plaintiff by a fair preponderance of the evidence; so you have first the question of negligence, then the question of contributory negligence, and then the question of damages. All those matters are very important, and in order to determine those fact questions you are to decide those matters upon the law that his Honor will give you at the end of the case and the facts that you hear here.

The Court, I believe, will tell you that this case comes under a Federal law of the United States called the Federal Employers' Liability Act. The law states that any carrier engaged in commerce be-

tween the states shall be liable in damages for injuries caused in whole or in part through the negligence of any of its officers or any of its employers. You will note that it does not say the whole negligence, but it says that if the negligence was just caused in part, then there is a responsibility on the part [21] of the defendant railway company. The Court will also tell you that in a case of this kind that we have this rule of law that is called comparative negligence which you do not find in the case under a state law. The law states that if the plaintiff, if he should be guilty of a little carelessness and if the combined carelessness of the plaintiff and the defendant caused this accident, then the amount of damages awarded to the plaintiff should be reduced in the proportion to the negligence that he bears. I do not believe that you will have to consider that because I believe when we consider the evidence we will see that there certainly was not any negligence on the part of Frank Reiner.

Now, the Court will also tell you that negligence is the failure to do or not to do what an ordinary prudent person would do under the same or similar circumstances. It does not mean that somebody does something deliberately. It means that a person probably for a second or so may be just a little careless.

The Court will also tell you, I believe, that if this accident was caused by the sole negligence of the plaintiff—that is Frank Reiner—there cannot be any recovery, but that was not the case here.

Now, the Court will tell you—the Court will go

on and give you various other instructions, and you are to apply those instructions to the facts that you have heard [22] from the witnesses.

In this case now we know that we had involved in this accident two Diesel engines, and we know certain facts are not disputed here, so we do not have any problem on the facts that are not disputed. We know that Mr. Frank Reiner worked for this railroad company for about 35 years, and all I have to say is when a man works for a railroad company for 35 years continuously he must be a pretty good man, and that certainly shows that he is the kind of man whose testimony we can accept and certainly believe.

He states that he went to work about 3:30 that evening of February 6th. He says that he did the work of a pilot-herder-switchman. As was brought out this morning, there is a difference between a pilot and a pilot-herder. You heard the difference as stated this morning. We are considering here a pilot who was doing pilot-herder-switchman work. The evidence is that Frank Reiner worked that day up until about 8:00 o'clock; that at 8:00 o'clock a Southern Pacific train came through the Northern Pacific Terminal; that he cut the train off. That was a double unit; that is, it was a continuing unit, with back to back. He said that it was his job to cut off the unit and then take it down to Guilds Lake yard for servicing, which was done. Now, on the way coming back he tells you that at 17th Street, that is, about, just as the unit reached 17th Street he said that the engineer stopped. [23] Now,

of course, we have to be practical about these things, and all that we ask is that you use the same judgment in deciding these matters as you do in your everyday affairs, the same judgment you use in your business and you use at your homes. We know that there was a train approaching on the mainline track. We know it is against the rules to make a reverse movement against traffic; we know that. We know that when that engine stopped there that Frank Reiner didn't know anything about why the engineer stopped. Now, mind you, that the fireman would be on this side (indicating), and the engineer would be on the right side going in a southerly direction. We know that when the engine stopped that the fireman was told only to do this, and this was the direction that he was—that he was told by the engineer, that he asked the man to go to the rear of the cab and to turn the headlight on to have it clear if some train employes would come back.

Now, mind you, the engineer, a man whom the defense didn't call, and I don't know the reason why, but we know probably Counsel can explain it to you—he and the fireman were the two men that were responsible for the operation of that engine. They were the two men that were supposed to keep a proper lookout, supposed to keep the engine under proper control and see that a safe course was followed.

Now, first we are going to start right in the [24] beginning. Was it a safe course for the engineer to

follow when he told the fireman just to go back and do what he told him to do, to go ahead and turn on the lights and if everything was clear to give, to buzz him three times to make the movement backwards? That was not a safe course because it was against the rules to make a reverse movement on a mainline track, such that would be going against traffic, and I just wonder whether the engineer gave the fireman those limited instructions. He probably knew, as Frank Reiner told you, that if he had known or if they had talked the matter over with him about making a reverse movement, he would not have made it, and that is why he was probably with the company 35 years.

He tells me that when the fireman came back that he went directly to the rear window. That would be right even, that would be the front of that rear cab, would be facing north, the windshield wiper there, and the light would be right out in front, and the fireman, by his own story, was not there to follow instructions; that he went immediately to the front end then and turned on the lights; that he looked, and he says that everything was clear, that this switch was green. Now, that is very important, Ladies and Gentlemen, about this switch here, whether it was green or whether it was red because there is a conflict of testimony there. There is no dispute about this fact that when that [25] fireman, that when he came along the westbound main track, that he was sitting on the west side, and we know it is not disputed that there was a train or a cut of cars, of 35 cars approximately, that

was on the eastbound main track. We know that, and we know that the engine had its lights on, and we know that they were going to move from the eastbound over to the westbound track, and we know before that train could move from the eastbound to the westbound track, we know that this switch had to be lined up, this switch had to be lined up, and when that switch was lined up that the movement must be going from the eastbound to the westbound track, this red light which sticks up—it's just like as he said, six feet above the ground—that light would had to have been red, and whether he turned on the light or he didn't turn on the light, if he was right up here in front of the engine where he says he was, why, then, he could have certainly seen, as I asked, "Nothing to obstruct your view from where the engine stopped to this light? Nothing at all." He had nothing to obstruct his view, nothing to obstruct his view when he came along there to see that there was an engine and 35 cars there that were on this other track, so that as far as Mr. Moore was concerned, if Mr. Moore had looked he would certainly have seen the engine down here and the cars, and he certainly would have seen those cars as he came up there before the unit stopped. If he had looked, he certainly [26] would have seen that that switch stand was red because, as Phillips told you, this cut of cars, that engine and the cars, only moved, what did he say, a mile and a half or two miles an hour, which is about the speed that somebody could walk.

Now, the front end of the engine would be up a considerable distance there at the time of the accident, so that this engine traveled at two miles an hour from this particular point over here (indicating) to a point that would be west of the switch because the impact took place beyond that where the engine was located, I believe the testimony is about the fourth or fifth car, so that we know that one of the things—that this must have been true without any question, if he had looked he should have seen it because the engineer told him to put on the light, and if he looked he could have certainly seen the red light. He could certainly have seen these cars over here, and if he looked and didn't see the red light that was right up in front, that was his job to do it. He was just a little bit careless, and he was negligent, a little careless either one way or the other, either looking and didn't see, or, if he didn't look, he was still just a little bit careless.

Now, as far as Mr. Reiner is concerned, as he told you, he says, "I knew nothing about any movement." He said that if a movement—this is undisputed—if such a movement [27] was to be made, he says that it would not have been made that way anyhow. He said, "I would have got out of the cab. First of all, I would have had to have permission to do it because you shouldn't make a move that way except you have permission." He says, "If I had permission from the yardmaster, then I would have walked back and I would have protected this cross-over switch there, but," he says, "I knew nothing about it." I guess that fact is ab-

solutely—that is disputed because when the fireman says he didn't receive any instructions to tell Reiner, he said that he went right back to where the light was, but, of course, it seems to me human nature when somebody is responsible for an accident causing injury to somebody, it seems to be human nature to say, "Well, oh, no, it wasn't my fault. I am not to blame for it." I think that that is generally true, and that is why, as far as Moore is concerned, he and Myers were in charge of the engine, they were responsible for this accident, and now he says that he got back there, he says that he told Mr. Reiner that he was going—that they were going to back up. He didn't tell them what they were going to do, back up a couple of feet or so.

Reiner says he knew nothing as to what the movement was going to be until when he heard the buzzing, the three buzzing sounds. Then he says the unit started back, and he says it was just a matter of seconds, which is right now. [28]

Just visualize that here is a movement that is not supposed to take place. Here is Reiner back there and before, he said, he had a chance to do anything—he hollered or was about to holler, "Hold 'er"—before he had a chance to do anything there was a collision, and that is verified by Mr. Moore. Moore said it just happened just like that, within a couple of seconds. Mr. Moore forgot one thing. If it happened just as he said it did, just a matter of seconds, then either he would have seen this movement down here, or he would have seen

that light that was red because there could be no movement made until the switch was red.

Now, there is Mr. Bray. Mr. Bray had nothing to do with the operation of the engine either, and we put on these men who are still with the company, men that have worked for the Terminal Company for years. You saw them here. There was three men, and every one of those men stated what the status of a herder was. They said that a herder has nothing to do with the operation of an engine. A herder cannot even touch one of those gadgets on the engine because that is not his job, and he would probably be reprimanded if he did. He has nothing to do with it, so, as far as he was concerned, when Mr. Moore talked about the fact that he said about putting on the lights dim, what did Mr. Reiner have to do with the lights? As a matter of fact, [29] he couldn't operate them, so why would, as Reiner stated, he deny that he said it, but what would be his object? We have to look at this in the light of a man who has been with the company 35 years. What would be his object to do it? Of course, he cannot work any more so that is a different proposition. Myers and Moore, of course, are working for the company at this time.

From the evidence, Ladies and Gentlemen, when we consider the evidence of all of these witnesses, there cannot be any question that there was negligence both on the part of the engineer and on the part of the fireman because, after all, you certainly cannot hold Mr. Reiner responsible for the actions of Mr. Moore when he received those instructions.

He followed out instructions, and, as we know, this happened just in a matter of seconds, how could anybody say that Mr. Reiner was the one responsible for what took place there?

But they say this, that, yes, he was guilty of contributory negligence—or comparative negligence. Well, now, what did he do? Just visualize the whole thing. What did Mr. Reiner do when he was there? What could he have done to have prevented it? Nothing at all. If Mr. Moore had gone back and sat in his seat, he could have either spotted the train; that is, he could have been at his own place there which has been on the right side of the car, that was the [30] place he was supposed to be when he came up with the unit, or if there was this big three-unit in the back that could have been run the same as the unit in front because there were two distinct units; but where is the negligence as far as this man is concerned?

Under the Federal Employers' Liability Act it states that if the negligence in whole or in part caused the accident which the plaintiff was injured in, then there is negligence, and, certainly, there is nobody can say that there was not some negligence on the part of the fireman and the engineer and that that negligence contributed to the cause of this accident.

We don't know why they didn't call Mr. Myers. I can't understand that. I am sure that we would all like to have heard from him, but he was not called. We certainly were not going to call the man

who was partly responsible with the fireman for this accident because he should have never given those instructions to the fireman to start with.

We know this, that prior to February 6, 1955, we know that Mr. Reiner had been a steady worker for this company. Otherwise, if he had been out of work at all, any time at all, they have his work record, and certainly we would have heard about it, but we know that he was a steady worker. I think Mr. Reiner was one of the frankest and most sincere men that I have seen and come in contact with here. [31] He told you, he said, "In 1953 when I was out hunting I had that injury to my knee, and I developed lumbago with my back for about 30 or 60 days. I never had any trouble before that time and all of the years that I worked for the railroad company. I never had any trouble until the time of this accident." Now, we know that that is an absolute fact. We know that his work record was good, and we know that he is the kind of a man that the defendant company certainly should have been proud to have had in their employ. We know that outside of the one time he was not laid up by anything. Now just think of it. Look back. Out of 35 years just consider that when a man is out only the amount of time that he is he must have been a pretty healthy man when he went to work the day of the accident, and, as a result of this accident, we know he had injury to his leg, the left leg, right knee and his left hip.

I am going to call your attention, Ladies and Gentlemen, to something that I think is very, very

significant. I do not want to take a lot of time, but you will recall this statement that was taken by the claim agent. That was on February 9th the claim agent put in there, and he said, "My back generally feels all right. I don't have any pain here in my back at this time, just on my left hip." That is over here (indicating). Now he went to Dr. Carlson, and you heard Dr. Carlson tell you that on the 17th of February that his— [32] the finding of lumbosacral sprain. That was one of the injuries he found him suffering from as a result of this accident besides this leg injury.

Now, can you tell me how you can reconcile both of these? I don't know how, but that is in the record.

They are probably going to say, "Why didn't you call Dr. Mundal? He is a good doctor. Why didn't they call him?" and they are probably going to criticize us for not calling the other doctors that he was examined by. What would have been the use of calling a number of doctors when we know the man had a fusion. We know by Dr. Carlson's testimony that he suffered this injury of his back which he found on the 17th day of February, 1955, and we also know, we also know that he had, that he was in traction for a couple of weeks, and we know that he had this fusion operation. We know that he has not been able to work since that time. Now, we know all of those things. It would have been just repetition. What would have been the use of us calling those other doctors? We called Dr. McMurray. He is a very fine doctor. He teaches sur-

gery at the Oregon University. Anybody that teaches young doctors at the University here in this state, I would say, would be a very fine man because I do not believe that the officials of the University would have anybody teaching except he is an A-No.-1 man, and that is why I selected him, and that is why we got him to come to [33] court, so he could give testimony as to what injuries he found this man suffering from at this time. He stated without any question that this man's condition was caused by the accident. He was in on February 7, 1955. He stated that was a result of that, and there isn't any question about it because we know Carlson found that lumbosacral sprain which was, as he said, one of the injuries on February 7th, just 11 days after the accident.

Ladies and Gentlemen, we now come to the proposition of damages, and I appreciate I am only—I want to be just as fair as I possibly can. When you come to the proposition of damages, the Court will tell you to take into consideration the wage loss of Frank Reiner up to the present time, which is 23 months. The testimony is that for eight months his wages at \$385 a month, and there is a loss there of \$3,080. There is a 15-month loss at \$425, which would be \$6,375, which would make a total of \$9,455 loss up to the present time. That is what we call out-of-pocket expense. Now, he has a life expectancy of 14½ years. The Court will tell you he may live longer; he may live less than that. We do not know. The Court will tell you that that is the life expectancy and that is something that

you have to consider, that he might live longer or live a less time. The present rate is \$425, a month, which for the year would be \$5,100. $14\frac{1}{2}$ times \$5,100 would be \$73,950. [34]

Well, now, there isn't any question about—there is no claim this man cannot do some light work. The testimony is that he cannot do this heavy work. As far as the railroad company, he can do some work, but we want to remember he is 59 years of age. We know that for a fellow to go out when he gets 59 and to try to get a job, it is tough for him to learn something else. What is he going to do? He has devoted his whole life to the railroad for 35 years, and this is his one and only chance for him to recover for the injuries he has suffered in this accident. He cannot come back later on and say that he didn't receive enough; that he should receive more.

Now, in trying to be fair as to what he would make, supposing he made \$200 a month. That would be \$2,400 a year. 14 times that would be \$14,834 which he should make, or probably not that much but probably pretty close to it. \$34,800 from \$73,950 is \$39,150, which would be his future loss. Now, that means his loss of wages up to the present time—the future would be \$48,605. Then the Court will tell you—I believe that on an instruction on damages you have a right to take into consideration the injuries and the pain and suffering up to the present time and in the future. The evidence shows that he had an injury to his back and left hip and an injury to his right knee, injury to his left knee.

He was taken to the Good Samaritan Hospital; that he [35] remained there in traction, and if you can visualize his traction, lying in a hospital room and being in traction for two weeks, it is not fun, and certainly he must have suffered a great deal of pain at that time. Then, further, later on he went to the hospital on October 2nd and was hospitalized for about 27 days. He had a fusion operation, and you heard the doctor describe the fusion operation, taking a bone from the hip and then putting it in the back, the lower vertebrae. Now, that is something, that is—it probably caused the plaintiff a great deal of pain also.

We know, as Dr. McMurray said, that the pain in his back is permanent, and he says that he is going to be disabled from doing railroad work. He has a life expectancy of $14\frac{1}{2}$ years, and we will suppose a man had no earning power at all, suppose he was a very rich man or he didn't work, had no earning power at all, then the fact that he had no earning power and would still be entitled to an amount for pain and suffering and for the injuries that he received in an accident after $16\frac{1}{2}$ years, which would be from the time of the accident up to the present time, 6,022 days, certainly an amount of \$35,000 would be fair if he had no earning power whatsoever; but I am just going to consider for pain and suffering and for the injury.

The Court: Do you wish to reserve any time for closing?

Mr. Rerat: Yes, your Honor. [36]

The Court: It has been 35 minutes.

Mr. Rerat: Thank you, your Honor. I just will finish right here. The amount of both of these loss of wages, plus for the pain and suffering and injuries, is \$83,605, which I think is a fair and reasonable amount to award this plaintiff in this case. It is for you to consider, and you make your own determination. Thank you.

(Argument by Mr. Gearin previously transcribed in another volume.) [37]

Closing Argument by Mr. Rerat

Mr. Rerat: I just want to say this, Ladies and Gentlemen, that when you have a man like Frank Reiner who has been with the railroad company as long as he has, 35 years, and then when he gets hurt and his counsel admits he had an injury in this accident to his back and even after he is in the hospital and even when he has all this trouble, what does he try to do? Does he say, "I am not even going to try to work"? The doctor doesn't even tell him to go back to work, and here he says, "Well, I want to try it. I want to try to see if I can work," and he goes ahead and he works for a period of about 30 days. He worked when it was extremely hard to work because what followed showed he must have suffered a great deal of pain and was suffering at the time that he was working.

What does that indicate to you? It certainly must indicate that he is the kind of man that you would expect, a man who wanted to see if he couldn't go

ahead and work because to him, after spending 35 years with this railroad company, that meant more to him than anything else in the world, to be able to work, and that is why he even tried to work when probably 99 out of 100 men would say, "Well, my back is bothering me so much that I can't work."

Now, I want to say that so far as doctors are concerned when you attack a man who teaches at the Oregon University, a man who has the qualifications of Dr. McMurray and [38] you are saying this about a man who is outstanding, and I am sure if all the officials of the University, if they were here and even heard what they said about Dr. McMurray, undoubtedly they have a high opinion of him or he certainly would not be on the staff of that University.

Now, as far as these pictures, I wasn't even going to mention them, but, after all, what did they disclose? Frank Reiner told you about what happened to his car. Somebody had taken those plugs out of there. They had taken pictures. What was the purpose of the pictures? As far as the purpose of the picture was concerned, there is no claim that the man has to be in a wheelchair. He is disabled from doing the kind of work that he has followed for 35 years, and all you have got to do is just look at the X-rays and hear what Dr. McMurray said, and I think we will agree. As far as heavy work, the man just simply cannot do it.

In conclusion, I want to say this, that I sincerely hope—I never met you people before, have not been in court here. I have made a lot of mistakes prob-

ably, but I hope you won't hold that against Mr. Reiner. After all, the attorneys have nothing to do with a lawsuit. You just pass us aside. We have nothing to do with the lawsuit at all. It is between Frank Reiner and the Northern Pacific Terminal. Now you consider—put me aside because, after all, those are the two people involved here, and I know that you people will not hold any feeling of bias or prejudice against Mr. Reiner because of me. I have tried to do the very best I could. I think it is the object of every lawyer to try to do the best he possibly can.

I know you will do that. I know that you are fair. I know that you are reasonable. All I ask you to do is to consider all of the evidence and then render to Mr. Reiner a fair and just verdict in this case. I think that when you consider all of the evidence and consider what the engineer did, what the fireman did, and you consider the fact that this man has been a wonderful employe of this company all that period of time, it certainly isn't asking too much of you to believe me. He has lived in the City of Portland for 41 years. They are fine people. You have heard the testimony of his wife. Know that you will take all those facts into consideration.

All I ask you to do is that when you are in your juryroom and when you agree on the amount that you believe this man should have, there is 12 of you, and if you can say to yourself under all of the evidence this is a fair and just amount, that is just the kind of amount it is going to be, everybody will be satisfied. This is this man's one and only chance

to recover. He cannot come back in two years or four years, or anything. The recovery is now. Thank you very much, Ladies and Gentlemen. [40]

The Court: You have concluded, Mr. Rerat?

Mr. Rerat: Yes, your Honor, I have.

The Court: Very well; then we will recess to 9:00 o'clock tomorrow morning.

Again, before we separate, I may admonish you of your duty not to converse or to communicate among yourselves or with anyone else upon any subject touching the merits of the trial. You are not to form or express an opinion on the case until after it has finally been submitted for your verdict. You are excused now until tomorrow morning at 9:00 o'clock.

(Thereupon, at 4:40 p.m., the jury retired for the evening recess.)

(The jury having retired, the following proceedings were had:)

Mr. Rerat: If your Honor please, may I make——

The Court: It is stipulated the jury have retired from the courtroom?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, sir. May I make an exception again to Counsel's argument on the fact that the attorneys are from various places, his argument wherein he stated that this was done to build up this case. I also want to again object and ask the Court to have the jury disregard the fact that this man

is receiving a pension, on the grounds that the pension [41] has no bearing whatsoever upon the issues in this case. It is incompetent, immaterial.

The Court: They were so instructed yesterday.

Mr. Rerat: Well, your Honor, Counsel again then stated——

The Court: It has no bearing upon his recovery. I told the jury that yesterday.

Mr. Rerat: Yes, but Counsel again stated to the jury that this man was receiving a pension. Now, probably I misunderstood, your Honor, but I thought that that was not to be even argued to the jury. Perhaps I was wrong.

The Court: As I understand, he was arguing it on the issue of whether or not this plaintiff had lost any future wages, whether he would work even if he were well.

Mr. Rerat: That's right, your Honor, but I think that whether a man is getting a pension is certainly immaterial to any of the issues here, and I think it is highly prejudicial, and I don't believe it has any place in the case.

The Court: The jury were instructed yesterday it has nothing to do with the amount of recovery, but I suppose that if an injured person comes into court and says, "I am injured, and I have lost future wages," that it would be competent for the defense to show that he is a millionaire and he would not work anyhow. Wouldn't it be competent for the defendant to come in and show he has not lost any future wages because he would not work anyhow? [42]

Mr. Rerat: Of course, your Honor, a pension is a different proposition. This man's age, as your Honor probably knows, and Counsel knows, he still has to be disqualified because of the physical disability, and it is not a matter if this man was at an age where——

The Court: The jury were told yesterday, Mr. Rerat. I do not think they need to be told any more than once that the pension has nothing to do with the amount of his recovery, if he is entitled to recover in this case.

Mr. Lezak: Your Honor, may I say something on this point? Mr. Gearin, you will excuse me.

The Court: Yes.

Mr. Lezak: In my opinion, it would not be proper for Mr. Rerat to put on evidence that this man was poor and, therefore, had to work in order to keep himself at more than he would make from the pension, and, at the same time, I do not think it would be proper for Mr. Gearin to put on evidence that he was a millionaire and did not have to work.

The Court: It is not a question of whether a man has to work. It is a question of whether or not it is reasonably probable in the future that he will lose wages, lose earnings.

Mr. Lezak: I say to your Honor that any attempt by us to prove poverty would be refused by the Court on that issue, and, by the same token——

The Court: Well, your proof is not to prove poverty. [43] Your proof is to prove that he has been working for so much, and you ask the jury to

believe he would keep on, but for the injury, working in the future.

Mr. Lezak: That's right, and we would not be permitted to show that he probably would continue working because he was poverty stricken, and, by the same token, I do not think it would be proper to show that he probably would not continue working because he was a millionaire.

The Court: I think it would be competent for you to show that he needs work.

Mr. Gearin: They do it all the time.

The Court: But the fact is that everyone needs to work until the contrary is shown, isn't it?

Mr. Lezak: You mean there is not the presumption of poverty.

The Court: Not poverty, you do not need to use that kind of talk. I am not speaking about presumption of poverty but the presumption that all of us have to work for a living. I believe there is a rational basis for that presumption.

Mr. Lezak: I do not mean to argue with your Honor.

The Court: I will hear you on it, but I do not see the necessity of saying anything more than has already been said to the jury.

Mr. Rerat: Your Honor, I would like to say first, your [44] Honor, that the cases hold, of course, that the defense cannot show that a man is receiving so much money a month from a pension. There are several cases under the F.E.L.A. Act which I would be very glad to show, to produce for

your Honor, that show if a man is getting a pension of \$150 a month, that is immaterial.

The Court: Of course, it is immaterial to his recovery. Of course it is. I said that to the jury yesterday, did I not? It is not competent to show that a man who has been injured does not need the money. Of course it is not competent. He is entitled to the money or he isn't, as I told the jury yesterday, irrespective of any pension; but when the plaintiff comes in and says, "I have been injured, and I have suffered pain and inconveniences and mental anguish and all the terrors that go with personal injury, but on top of that I have lost what I would have earned but for the fact that I was injured," then it seems to me it is competent for the defense to defend against that by showing he has not lost anything he would have earned because he would not have earned anything even if he had not been injured. If you feel differently, we just have a different view about that.

Mr. Rerat: Your Honor, I certainly highly respect your Honor's opinion on this, and I hope that because I differ with you that it won't make any difference.

The Court: You do not need to apologize for anything—[45] for any differences with me.

Mr. Rerat: Yes; well, there are several cases—the point I am trying to distinguish in my own mind is that these cases hold that, for instance, with the plaintiff on the stand that you cannot say to him, "Mr. Brown, you are on a pension. You are getting \$150 a month." Well, now, if you cannot say that

to the plaintiff, your Honor, then how can you say, "Well, you are on a pension," because the jury would infer that he must be getting something, so it is the same thing. That is according to my opinion. I have several cases on that that I would be very glad to submit. I think it is a very important point.

The Court: I think I know the cases you are referring to, and there is no question about it. I instructed the jury yesterday. Now that's all I care to say on the subject. If you had asked me during the course of argument to reiterate those instructions, I would have done so, but I don't see any point in emphasizing it now.

Mr. Rerat: Well, of course, when Counsel is arguing——

The Court: You didn't hesitate to interrupt him once.

Mr. Rerat: I did, but I didn't get any place.

The Court: I don't think you gentlemen are so tender. You act like quite experienced lawyers to me.

Mr. Rerat: Thank you, your Honor. I would like to submit those decisions to your Honor anyhow, if I may, in the [46] morning.

The Court: You may. I will be glad to have them.

Mr. Rerat: Thank you.

The Court: The trial will be recessed until tomorrow morning at 9:00 o'clock. If you want to send those decisions in at 9:00, I will be glad to read them.

Mr. Rerat: Thank you.

(Thereupon, at 4:50 p.m., trial in the above-entitled cause was recessed to 9:00 a.m., January 23, 1957.) [47]

January 23, 1957—9:30 A.M.

proceedings herein were resumed, pursuant to adjournment, as follows:

The Court: I notice we have a vacancy in the jury, Gentlemen. Who is absent, Mr. Clerk?

The Clerk: Mr. Beard from Salem.

The Court: If there is no objection, it is a half-hour after the announced time to convene, Mr. Berni, the alternate, will take the place of Juror No. 2, Mr. Beard. Is there any objection on the part of anyone?

Mr. Gearin: No, sir.

Mr. Rerat: None on the part of plaintiff.

The Court: Very well, Mr. Berni will take Seat No. 2.

(Thereupon, the alternate juror above referred to took Seat No. 2 in the jury box.)

The Court: This is perhaps one time we can be very glad to have our insurance policy. But for that, we might have to try the case all over [48] again.

INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen of the Jury: You have heard the evidence and the argument. It

is now my duty to instruct you as to the law governing this case. It is your duty, as jurors, to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of facts presented by the allegations of the complaint of the plaintiff, Frank Reiner, and the answer thereto of the defendant, Northern Pacific Terminal Company of Oregon. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal [49] standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of per-

sons; all persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of the plaintiff's case by a preponderance of the evidence. If the proof fails to establish any essential element of plaintiff's case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth, after you have considered all the evidence in the case.

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or a conclusion which reason and common sense lead the jury to draw from facts which [50] have been proved.

A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed the jury are bound to find in accordance with the presumption.

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, all facts and events which have been judicially noticed, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, [51] you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the

testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. [52] In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find a presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

The nature and extent of the injuries, if any, which proximately resulted from an accident may not be provided by evidence of statements as to aches, pains or injuries made to a doctor in connection with the doctor's observation, examination or treatment. Such statements are received in evi-

dence for the purpose of enabling the doctor to tell you everything upon which he may have based any opinion expressed as to a person's physical or mental condition.

The opinion of a doctor as to the condition of a patient may be based entirely upon objective symptoms revealed through observation, examination, tests or treatments; or the opinion may be based entirely upon subjective symptoms revealed only through statements made by the patient; or the opinion may be based in part upon objective symptoms and in part upon subjective symptoms.

To the extent that any opinion testified to by a doctor is based upon subjective symptoms stated to him by a [53] plaintiff, the jury are entitled to consider the truthworthiness of such statements in determining the weight to be given the opinion.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

While the burden rests upon the party who asserts

the affirmative of an issue to prove his allegation by a preponderance of the evidence, this rule does not require demonstration or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this it is proper to find that a party has succeeded in carrying the burden on an issue of fact if, after considering all the evidence in the case, the evidence favoring such party's side of the question is [54] more convincing than that tending to support the contrary side, and if it causes the jurors to believe that the probability of truth on such issue favors that party.

The plaintiff in this case claims damages for personal injuries alleged to have been suffered as a proximate result of claimed negligence on the part of the defendant.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care under the circumstances in the management of one's property or person.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or others. Ordinary care is not an absolute term, but a relative one. By this we mean that in deciding whether ordinary care was exercised in a given case,

the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

The mere fact that an accident happens, considered alone, does not support an inference that some party, or any party, to this action was negligent.

Inasmuch as the amount of care used by the ordinarily [55] prudent person varies in direct proportion to the dangers known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary with the nature of the act and the surrounding circumstances. To put it another way, as the danger that should reasonably be apprehended increases, so does the amount of care required by law also increase.

Section 1 of the Federal Employers' Liability Act under which the plaintiff claims the right to recover damages in this action, provides in part that:

“Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier.”

It is conceded that, at the time alleged in the complaint, the defendant was a common carrier by railroad engaged in interstate commerce; that the plaintiff was then an employe of the defendant en-

gaged in such commerce; and that the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act. [56]

Section 4 of the Federal Employers' Liability Act provides in part:

“That in any action brought against any common carrier to recover damages for injuries to any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents or employes of such carrier.”

The duty of the defendant to exercise reasonable care in furnishing its employes a reasonably safe place in which to work is not relieved by the fact that the employes' work at the place in question was either fleeting or infrequent. The duty of the defendant is a continuing duty.

While it was the duty of the defendant in this case to use ordinary care in furnishing the plaintiff, at the time of the accident in question, with a reasonably safe place in which to work and to use ordinary care under the circumstances to maintain and keep such place in a reasonably safe condition, this does not mean that the employer is a guarantor of the safety of the place to work. The extent of the defendant's duty to its employes is to see that ordinary care is exercised to the end that the place in

which the work is to be performed may be safe for workmen.

In order to establish the essential elements of [57] plaintiff's case, the burden is upon the plaintiff to prove by a preponderance of the evidence the following facts:

First, that the defendant was negligent in one or more of the particulars alleged; and, second, that the defendant's negligence was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

The proximate cause of an injury is a cause which, alone or in conjunction with other causes, produced the injury. Thus, an act or omission of a person which sets in operation something that brings about an injury is held to be the proximate cause of the injury, unless the causal force of the act or omission has been broken by some new or intervening cause prior to the injury.

This does not mean that the law recognizes only one proximate cause of an injury, consisting of only one fact or thing, the conduct of only one person. To the contrary, many factors or things, the conduct of two or more persons, may operate concurrently, either independently or together, to cause an injury; and in such case each is regarded in law as a proximate cause.

Since a corporation can act only through its officers, agents or employes, the burden is upon the plaintiff to prove by a preponderance of the evidence that the negligence of one or more officers, agents or employes of the defendant, other than the plaintiff,

was a proximate [58] cause of any injuries and consequent damages sustained by the plaintiff.

Any negligent act or omission of an officer, agent or employe of a corporation in the performance of his duties is held in law to be the negligence of the corporation.

If you should believe from the satisfactory evidence that the plaintiff was guilty of negligence in any one of the particulars charged and that such negligence of plaintiff constituted the sole cause of his injury, then in that event the plaintiff cannot recover against the defendant in this case.

In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant further alleges by way of affirmative defense that even if the negligence of the plaintiff was not the sole cause, contributory negligence on the part of the plaintiff was nonetheless a proximate cause of any injury which plaintiff may have sustained.

Contributory negligence is negligence on the part of a person injured which, co-operating in some degree with the negligence of another, helps in proximately causing the injury.

The burden is on the defendant alleging the affirmative defense of contributory negligence to prove, by a preponderance of all the evidence in the case, the allegation [59] that the plaintiff was negligent and that such negligence was a proximate cause of any injury which the plaintiff may have sustained.

Section 3 of the Federal Employers' Liability Act provides in part:

“In all actions brought against any common carrier by a railroad to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.”

So the issues to be determined by you in this case are these:

First: Was the defendant negligent?

If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely:

Second: Was the negligence of the defendant a proximate cause of any injury to the plaintiff?

If you answer that question in the negative, you will return a verdict for the defendant; but if you answer it in the affirmative, you should then find the answer to a third question, namely:

Third: Was the plaintiff negligent? [60]

If you find that he was not, then, having found in the plaintiff's favor in answer to the first two questions, you should determine the amount of the plaintiff's damages and return a verdict in his favor for that amount.

If you find that the plaintiff was negligent and further find that the plaintiff's own negligence was the sole cause of any injury he may have suffered, then your verdict should be in favor of the defendant.

If you find that the plaintiff was negligent and that his negligence was not the sole cause, but did contribute proximately to the accident, you should determine the full amount of the damages sustained by him and then determine in what proportion, figured in percentages, the negligence of the plaintiff contributed as a proximate cause of the accident. When you have determined the percentage in which the plaintiff's negligence contributed to cause the accident, you will then reduce the total damages by subtracting a sum equal to that percentage caused by the plaintiff's negligence and return your verdict in favor of the plaintiff for the amount remaining. That is to say, under the circumstances such as last described, if you found that the defendant was negligent and that the plaintiff was also negligent and plaintiff's negligence contributed half to the injury, then you would reduce his damages by one-half or whatever percentage you might find under those circumstances. [61]

If, under the Court's instructions, you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you shall include the reasonable value of the time, if any, necessarily lost by the plaintiff since the injury, because of being unable to pursue his occupation as a proximate result of the injury. In determining this amount you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled;

also, such sum as will compensate the plaintiff reasonably for any loss of earning power occasioned him by the damage in question, and from which he is reasonably certain to suffer in the future.

In fixing this amount you may consider what plaintiff's health, physical ability and earning power were before the accident, and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent, or, if not permanent, the extent of their duration; all to the end of determining the effect, if any, of his injury upon his future earning capacity and the present value of any loss so suffered.

You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find [62] him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have gone on working had he not been injured, and, hence, is relevant to the issue of whether or not he has lost any future earnings.

Also, in determining any damages to the plaintiff, you will consider and award him such sum as will compensate him reasonably for any pain, discomfort and anxiety already suffered by him proximately resulting from the injury in question, and for

such pain and discomfort and anxiety, if any, he is reasonably certain to suffer in the future from the same cause.

According to the American Experience Table of Mortality, the life expectancy of a male person 59 years of age is 14.74. This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if any, to be awarded in the event you find that plaintiff is entitled to a verdict.

Life expectancy, as shown by the mortality tables, is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that [63] estimate is based on not a complete but only a limited record of experience. So the inference which may be drawn from the table applies only to one who has the average health and exposure to danger of people of that age. In considering the table of mortality, you should also consider all other facts and circumstances in evidence bearing on the life expectancy of the plaintiff, including his occupation, habits and state of health.

You are not to assess damages for any injury or condition from which the plaintiff may have suffered or may now be suffering unless it has been established by a preponderance of the evidence that such injury or condition was proximately caused by the accident in question.

If, under the Court's instructions, you should find that plaintiff is entitled to a verdict, in fixing the amount of your award you may not include in or add to an otherwise just award any sum for the pur-

pose of punishing the defendant or to set an example. Nor does the law permit you to include in your award any sum for the payment of court costs or attorneys' fees.

Damages must be reasonable. In the event that your verdict is for the plaintiff, you may award him only such damages as will fairly and reasonably compensate him for the injuries or damages which you believe from a preponderance of the evidence he has sustained as a proximate result of the [64] accident.

The law of the United States permits the Judge to comment to the jury on the evidence in the case. Such comments are only expressions of the Judge's opinion as to the facts, and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

During the course of a trial I occasionally ask questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

It is the duty of the Court to admonish an attorney, who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

It is the duty of attorneys on each side of a case

to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. It is the duty of the Court to decide whether, under the rules of evidence, such testimony or other evidence may be received.

Whenever the Court has sustained an objection to an [65] offer of evidence, the jury are not to consider in their deliberations the offer or the objection or the ruling of the Court in rejecting the offered evidence.

Thus, when the Court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer. Nor may the jury assume an attorney has objected to a question because he expected the answer, if given, would be unfavorable to his side of the case. In allowing evidence to be introduced over the objection of counsel the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The fact that I have instructed you as to the measure of damages in this case should not be considered as intimating any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are intended for your guidance in the event you find from the evidence in favor of the plaintiff.

The verdict must represent the considered judg-

ment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one [66] another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Upon retiring to the jury room you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience. I exhibit them to you. First, there is a form of verdict in favor of the plaintiff. It is entitled in the court and cause and reads, “We,” the jury in the above-entitled cause, find in favor of plaintiff, Frank Reiner, and assess his damages in the sum of blank dollars. Portland, Oregon, January blank, 1957.” Line for signature over the words “Foreman of the Jury.”

If it be your unanimous verdict that the plaintiff [67] should recover in this case, you will have your foreman write in the space opposite the dollar sign the amount of your award as you shall unanimously agree to, date and sign this form, and return with it to the courtroom.

The other form I now exhibit to you is a form of verdict in favor of the defendant and reads: "We, the jury in the above-entitled cause, find in favor of defendant, Northern Pacific Terminal Company of Oregon. Portland, Oregon, January blank, 1957." Line for signature over the words "Foreman of the Jury."

If it be the unanimous agreement of the jury that your verdict should be in favor of defendant, you will have your foreman complete the date, sign that form in favor of the defendant, and return with it to the courtroom, if you should unanimously agree.

Before finally submitting the case to you, there are some matters I wish to take up with counsel, so I will excuse you for a three-minute recess at this time. Again, before we separate, I must admonish you of your duty not to converse or to communicate among yourselves or with anyone else on any subject touching the merits of this trial and not to form or express an opinion on the case until it has finally been submitted to you for your verdict. You are now excused for a three-minute recess.

(Jury takes a recess.) [68]

The Court: Is it stipulated, Gentlemen, that the jury has retired from the courtroom?

Mr. Rerat: Yes, your Honor.

Mr. Gearin: Yes, sir.

(Discussion between Court and counsel.)

The Court: Does plaintiff have exceptions to be noted?

Mr. Rerat: Yes, your Honor; the plaintiff excepts to the Court giving the instruction to the jury in regard to the pension that the point of his receiving and to the effect and consideration that the jury should give to such a pension on the grounds that—do I have to state them, your Honor?

The Court: I admit I interpolated that, what I said this morning, into my instructions because of the request you made last night. I felt it might unduly emphasize the matter if I merely mentioned it to them, but I gave the instruction as you suggested, but to interpolate into the instructions on the question of damages, I thought it would remind them of the instructions previously given and would not unduly emphasize it one way or the other, but you object to anything on the subject, as I understand your objection.

Mr. Rerat: Yes, your Honor. The position of the plaintiff has been from the time the question was asked by counsel for the defendant that it is improper and was improper to ask the plaintiff whether or not he received a pension. The [69] answer was allowed, or, rather the plaintiff was made to answer the question. The answer was Yes. The jurors would then infer that if he was getting a pension that he would be getting some amount of

money as the result of his pension, and the plaintiff has felt right along that such testimony was inadmissible and highly prejudicial to the rights of the plaintiff in this case. That is the only exception I have.

The Court: Do you wish to say anything on the matter, Mr. Gearin?

Mr. Gearin: I have expressed my position on that before, your Honor.

The Court: Are there any further exceptions or objections?

Mr. Rerat: No, your Honor; that's all.

The Court: The defendant?

Mr. Gearin: The defendant objects to the giving by the Court of Instruction No. 24 with regard to a safe place in which to work, on the grounds and for the reason that this case does not involve a place, as such, and that the instruction, therefore, is abstract and improper, prejudicial to the defendant. We object to the Court's giving its Instruction No. 25 with regard to a safe place to work insofar as it has to do with the plaintiff's work being fleeting or infrequent. That is not in the case, and we will object on the same grounds [70] as we did to 24.

We object to the Court giving Instruction No. 26 with regard to the assumption of risk because that is not in the case. It is not pleaded. It is not mentioned in the evidence or otherwise. We think it is, therefore, abstract and improper, prejudicial to the defendant.

The Court: Is there anything further, Gentlemen, by either side?

Mr. Gearin: No, sir.

Mr. Rerat: Just this, your Honor: Yesterday the plaintiff submitted two additional instructions and I believe that your Honor denied the giving of both of them, and the plaintiff would like to except to the refusal to give those instructions.

The Court: Very well. Is there anything further from either side?

Mr. Gearin: No, sir.

Mr. Rerat: No.

The Court: Mr. Bailiff, will you summon the jury?

(Jury returns to the jury box.)

The Court: Is it stipulated, Gentlemen, that the jury are present?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Very well; Mr. Clerk, will you swear the [71] Bailiff.

(Bailiff sworn.)

The Court: Ladies and Gentlemen of the Jury, you will be in the custody of the Bailiff who has just been sworn. The Bailiff will take with him to the jury room for your use two forms of verdict and the exhibits received in evidence in the case.

According to my notes, Gentlemen—I wish that you check me—the exhibits received in evidence are as follows:

Exhibits 1, 2, 3, 4, 5 are photographs. Exhibit 26 is a statement by the claim agent. Exhibit 10 is an anatomical chart. Exhibit 6-A—how many X-rays are there?

The Clerk: -A and -B, sir.

The Court: -A and -B are X-rays. Exhibit 7 is a hospital record. Exhibits 12-A, -B, -C -D, -E and -F are a series of six X-rays taken by Dr. McMurray. Exhibit 13 is an excerpt from the union contract. Exhibit 21 is a copy of the rules of the railroad. Would that be correct?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Exhibits 25-A to -J, inclusive, are some photographs. Exhibit 28 is a motion picture film exhibited to the jury yesterday. Exhibit 30 is the complaint in this case. Exhibit 30-A is a supplement to the complaint in this [72] case. Exhibit 31 is the complaint in Case No. 8038, and Exhibits 33-A to -K, inclusive, are X-rays taken by Dr. Carlson, I believe. Are they the only exhibits which have been received in evidence in the case?

Mr. Gearin: So far as my memory serves me, your Honor.

Mr. Rerat: Yes, your Honor, so far as I have checked.

The Court: Do you agree, Mr. Clerk?

The Clerk: Yes, sir.

The Court: The Clerk agrees with us, so that must be correct. Will you hand all those exhibits to the Bailiff so he can take them to the jury room for the use of the jury. Is there a place to plug in the viewing box?

The Bailiff: Yes, sir.

The Court: I suggest you take that along also, in the event the jury might wish to make some ex-

amination of the X-rays. If there is nothing further, Gentlemen, the jury may now retire to deliberate upon the verdict.

(Thereupon, at 10:15 a.m. the jury retired for deliberation upon its verdict.)

The Court: Now, is it stipulated, Gentlemen, the jury has retired?

Mr. Gearin: Yes, sir.

Mr. Rerat: Yes, your Honor.

The Court: Court will be in recess subject to call. [73]

Certification

We, Gordon R. Griffiths and William A. Beam, Official Reporter and pro tem Reporter, respectively, to the above-entitled Court, do hereby certify that at the time and place mentioned in the captions we reported in shorthand all proceedings had and testimony adduced during the trial of the above-entitled cause; that our shorthand notes were thereupon reduced to typewriting under our direction, and the foregoing transcript consisting of 277 pages is a true and correct transcript of all such proceedings had and testimony adduced, and of the whole thereof.

Witness Our Hands, at Portland, Oregon, this 17th day of January, 1958.

/s/ GORDON R. GRIFFITHS,

/s/ WILLIAM A. BEAM.

[Endorsed]: Filed January 17, 1958.

No. 15677

United States Court of Appeals
FOR THE NINTH CIRCUIT

FRANK REINER,

Appellant,

VS.

NORTHERN PACIFIC TERMINAL COMPANY OF
OREGON, a Corporation,

Appellee.

Appeal from the United States District Court
for the District of Oregon.

APPELLANT'S BRIEF

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FILED

APR 25 1958

PAUL P. O'BRIEN, CLERK

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United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15677

FRANK REINER,

Appellant,

vs.

NORTHERN PACIFIC TERMINAL COMPANY OF
OREGON, a Corporation,

Appellee.

Appeal from the United States District Court
for the District of Oregon.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

The Pleadings.

The Complaint alleges that the Court below had jurisdiction of the action as one brought under the Federal Employers' Liability Act, *U.S.C.A.*, Title 45, Sections 51-60; that on February 6, 1955, plaintiff was employed by the defendant as a "pilot herder" in the Terminal operated by it in the City of Portland, Oregon (R. 4, par. V); that while plaintiff was in the performance of his duties as such "pilot herder," he was riding in the trail unit of two diesel engines coupled together back-to-back; that, while plaintiff was so riding in the rear diesel unit, the defendant, by its agents,

servants and employees, caused the double diesel unit to reverse its course and to be operated carelessly and negligently so as to collide with a cut of cars which were in the process of being switched from an adjacent track onto the track on which the diesel unit was situated; that the operation of the diesel unit in reverse was under the circumstances negligent in that it was done at a high and dangerous speed and in violation of the rules of the company, without having the diesel units under control, without keeping a proper lookout, and disregard of the safety of the plaintiff and others, that thereby the defendant failed to provide plaintiff with a reasonably safe place to work and that thereby the defendant negligently failed to adopt a reasonably safe plan and method for performing said work (R. 56, par. V).

The Complaint further alleges that as the direct and proximate cause of such negligence plaintiff was severely injured (R. 6-7, pars. VI, VII, VIII).

The Answer alleged that the Complaint failed to state a claim upon which relief could be granted; contained a general denial of the allegations of the Complaint, admitted that plaintiff was employed as a "pilot herder"; and that plaintiff was guilty of contributory negligence which was the sole, proximate, contributing and concurring cause of his injury.

JURISDICTION OF DISTRICT COURT

The District Court for the District of Oregon, the court below, had jurisdiction of this action under and by virtue of the provisions of *U.S.C.A.*, Title 45, Section 56, which, so far as here pertinent, provides:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under

this chapter shall be concurrent with that of the courts of the several States.”

Portland, Oregon, is the residence of the defendant and the place wherein the cause of action arose. It is also the place where the defendant was doing business at the commencement of the action.

JURISDICTION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT TO REVIEW THE JUDGMENT

This Court has jurisdiction to review the judgment below under and by virtue of the provisions of *U.S.C.A.*, Title 28, Section 1291, as amended October 31, 1951, and which, so far as here material, reads:

“The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. * * *”

The judgment below is a final decision.

JURISDICTIONAL AVERMENTS

The Complaint alleges that the action is one brought under the Federal Employers' Liability Act, *U.S.C.A.*, Title 41, Sections 51-60 (R. 3, par. I); that the defendant is a railroad corporation incorporated under the laws of the State of Oregon and operating a freight and passenger business within that state (R. 3, par. II); and that the plaintiff sustained his injuries as a result of the defendant's negligence while so employed by it in the City of Portland, Oregon, which is within the territorial jurisdiction of the court below (R. 4-5, par. IV); these jurisdictional averments are, in effect, admitted by the answer (R. 8-9).

STATEMENT OF FACTS

Plaintiff, Frank Reiner, was employed by the defendant in the Northern Pacific Terminal Depot as a "pilot herder" switchman (R. 31-33). He was injured in an accident on February 6, 1955, at about 9:15 p. m., in a collision which occurred between the two-diesel unit and a freight train at a place between the Terminal Depot and the Guild Lake Yards. The Guild Lake Yards are about two miles from the depot (R. 34).

Reiner had been employed by the defendant for about 35 years prior to the accident (R. 31). He reported for work on February 6, 1955, at about 3:30 p. m. (R. 32). His working hours were from 3:30 p. m. until about 11:30 p. m. (R. 32). He reported for duty at his regular place in the depot (R. 32).

The duties of a "pilot herder" are defined by provisions in the union agreement between the defendant and the union, which was marked Plaintiff's Exhibit 13, and which was received in evidence at page 99 of the Record (R. 39). The provisions thereof, so far as herein pertinent, were read into the record at pages 100-101, and are as follows:

"It is the Company's position that a Pilot's duties also properly include the following:

"1. The coupling and/or the uncoupling of cars on passenger trains at the crossings in depot passenger train yard.

"2. The coupling and/or uncoupling of road engines of passenger trains in the depot passenger yard (81).

"It is also the Company's position that giving the necessary signals for passenger trains to proceed when they are to leave the depot passenger yard when loading of passengers, mail, express, etc., has been completed and likewise governing the movement of passenger trains within the depot yard tracks to discharge the aforementioned traffic and to pull over passenger, foot, or truck crossings is Stationmaster's work."

The qualifications of a "pilot herder" are that he must be a qualified engine fireman (R. 102); that it is the duty of a "pilot herder" "to uncouple the cars, the passenger train cars, at the height shed and couple them if necessary, to uncouple the road engines from the trains and to couple them to the trains" (R. 103). The "pilot herder" travels with the engine from the Terminal to Guild Lake Yards in some cases (R. 103). The "pilot herder" has nothing whatever to do with the operation of the engine (R. 103). He has nothing to do with putting on the headlight, either dim or bright (R. 103). He has nothing to do with the operation of the windshield (R. 103-104). There is a fireman and an engineer in the front cab when the engine is being operated (R. 104). The "pilot herder" has nothing to do with keeping a lookout on the track for obstructions, but is required to be alert at all times (R. 104). The "pilot herder" has no duties to perform so far as keeping a lookout to the rear or to the front for obstructions when the movement of the train is made on a mainline track with a double diesel unit and the unit makes a stop (R. 104). And he has nothing to do with any mechanism of the diesel or locomotive (R. 104).

The witness Leap made the statement in his testimony that a "pilot herder" switchman "pilots the engine" and that the one who pilots the engine is under the duty to take a safe course (R. 106). The duties of a "pilot" as distinguished from a "pilot herder" are defined by Rule 108, which is referred to in the Record at page 106. Rule 108 is contained in the rules adopted by the company, which were received as Exhibit 21 in the Record at page 107.

A "pilot" as distinguished from a "pilot herder" does have a duty of maintaining a lookout. This is covered by Rule 106 which is part of the defendant's rules and reads as follows (R. 107) (*italics supplied*) :

“The *conductor* and the *engineer* and *pilot*, when there is one, are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules must take every precaution for protection.”

The witness Curtis gave testimony to the effect that the duties of a “pilot herder” are substantially as stated above with the exception that if the “pilot herder” was in a position to see ahead it was his duty to keep a lookout (R. 136-139).

In order to clarify the testimony as to exactly what the respective duties of a “pilot herder” and a “pilot” are, the witness Leap was re-called. After reiterating his testimony in chief, he testified further, that in a situation such as was shown by the evidence, where a diesel unit stops and intends to make a reverse movement, it would be the duty of the pilot herder to get off the diesel, go back along the track to protect the movement and do whatever was necessary there under the circumstances (R. 147-148).

On cross examination he testified that if the pilot herder knew that the reverse movement was to be made, he would be under the obligation to protect the backup movement (R. 149).

The defendant's witness Moore testified on direct examination that plaintiff, as the “herder,” was responsible for maintaining a lookout in connection with the backward movement (R. 151); that he, Moore, turned on the light on the diesel “dim,” because plaintiff told him to do so (R. 152).

On cross examination Moore testified that both the engineer and the fireman were under the duty of keeping a proper lookout in connection with the backward movement (R. 154-156); and then Rule 22 was read into the record and is as follows:

“Rule 22: Firemen are subordinate to engineers. Engineers must see that firemen are familiar with and perform their duties, instruct them if necessary, and see that they are conversant with and properly understand and comply with the rules and special instructions, particularly those relating to the operation of trains. Disobedience and incompetency must be reported. The engineer or the fireman must not move the train or any part of its machinery unless he knows that it can be done without injury to anyone. The engineer or fireman must not go underneath the engine without notifying the other. * * *”

He further testified that the plaintiff was in the rear of the cab and not in the front and that he, Moore, was in the engineer's seat and a fireman by the name of Brady was in the fireman's seat when the backward movement was undertaken and during all the time it was in progress (R. 157-161).

Moore further testified that Reiner was sitting in the engineer's seat (R. 167); that he considered it his duty to “look out to see if everything was clear” before the movement went back (R. 163).

The accident occurred on the return trip at a place referred to in the Record as about one-half a mile from the depot or about 500 feet north of 17th Street. The *locus in quo* is illustrated by a sketch which we have made to illustrate the testimony but it was not introduced in evidence. We think it is sufficiently accurate to portray the situation. (See following page.)

The two-diesel engine unit had hauled a train into the depot where plaintiff disconnected the diesels from the train for the purpose of having the diesels taken to the Guild Lake Yards for the purposes of servicing the diesels. The trip to the yards was uneventful. The diesels were in charge of the hostler regular engineer, one Meyers, and the regular fireman hostler helper, one Moore (R. 34).

On the return trip, the diesels were attached to each other, end to end, with a cab at each end of the units. The engineer and the fireman sat in the cab at the front of the joined units (R. 34). Plaintiff and the boilermaker, by the name of Bray, sat in the cab in the rear engine, Bray occupying the fireman's seat and plaintiff, the engineer's seat. The two-diesel unit proceeded from the Guild Lake Yards to the main westbound track (R. 36). Then it proceeded on the main westbound track until the accident occurred. While the two tracks are referred to as the "eastbound main line and the westbound main line," the tracks, as a matter of fact, ran in a general northerly and southerly direction. They were separated from each other by a space of about 40 feet. The track on the east side was known as the "eastbound main line" and the one on the west side known as the "westbound main line." There is a set of tracks connecting the westbound main line with the eastbound main line which is known as a "crossover" track (R. 37). The record is not explicit as to how far the crossover track lies from the depot or the Guild Lake Yards, but plaintiff's testimony shows that it was approximately 500 feet north of 17th Street.

The weather conditions were that it was a dark, rainy, drizzly night. There was need for the use of windshield wipers to keep the windshields in such shape that the engineer and fireman could see through them. It was also necessary to have the lights on for purposes of visibility.

When the two-diesel unit got near 17th Street, the engineer, Mayers, stopped the forward movement. After this had been done, Moore, the fireman or hostler helper, came to the cab of the rear unit where he told plaintiff, "get off the seat, Frank," which plaintiff did. Then plaintiff inquired of Moore, "What is the matter now?" Moore replied, "There is something that we want to try out and we might have to go to the Lake yards" (R. 38). Plaintiff stood a little

ILLUSTRATIVE DIAGRAM

GUILD LAKE YARD

← 17TH ST. CROSSING

1/2 MILE

DIESELS STOPPED ON OR NEAR THROUGH CROSSING, THEN BACKED NORTH

480'

DIESELS

4TH CAR FROM ENGINE WHEN IMPACT OCCURED

CROSSOVER

30 TO 35 CARS

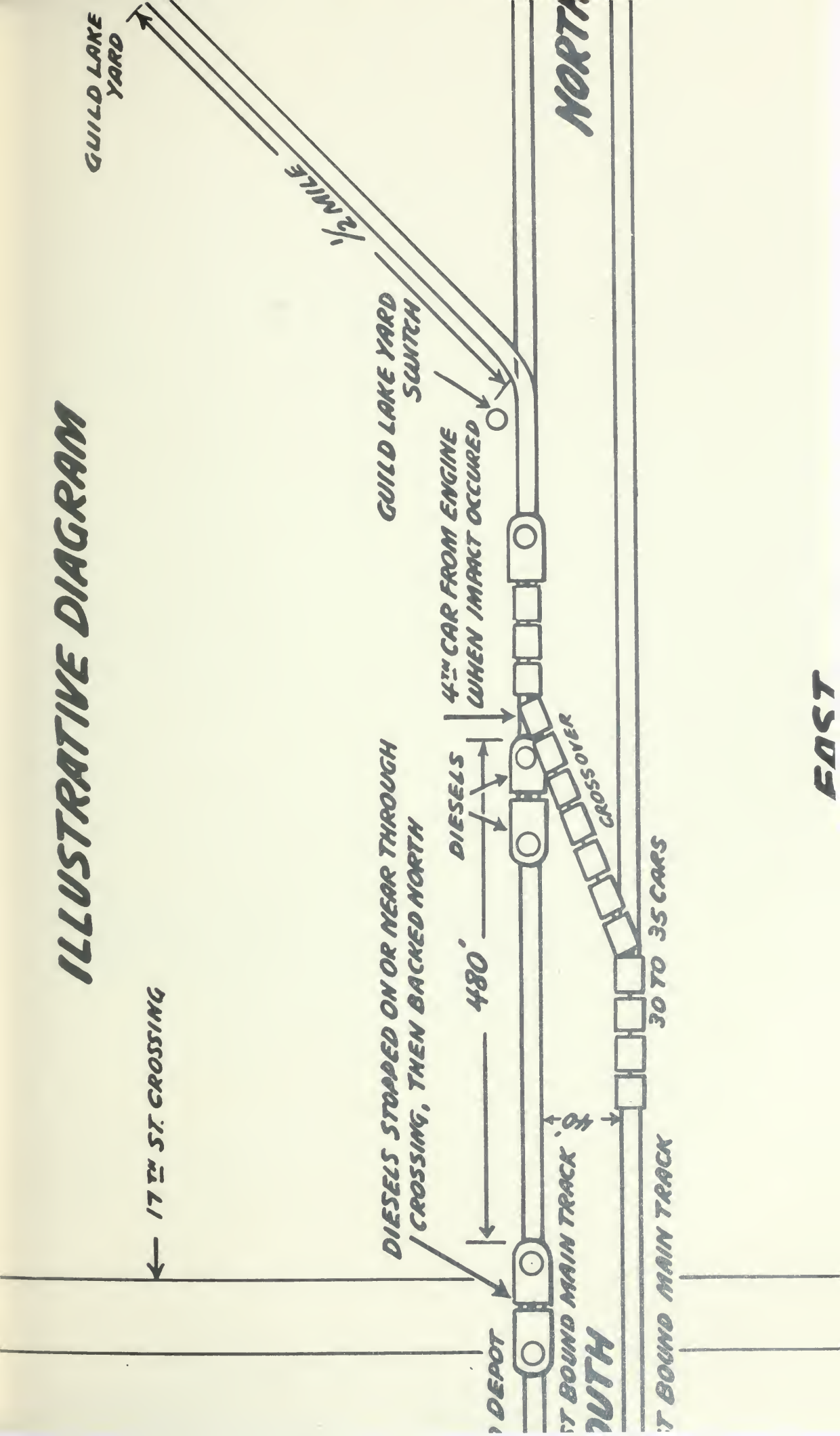
NORTH

ST BOUND MAIN TRACK

DEPOT

ST BOUND MAIN TRACK

EAST



to the rear of the engineer's seat and the fireman's seat, apparently in the center of the engine. Plaintiff used the phone in the cab for the purpose of talking to the engineer who was in the cab of the other unit. Moore gave a buzz signal three times which indicated a back-up movement (R. 38). This meant that the two-diesel unit, which had been proceeding toward the terminal depot, was to be backed up to the Guild Lake Yards from which they had just come.

At the time the two-diesel unit had come to a stop at 17th Street, a train, consisting of a locomotive and some freight cars, was seen on the adjoining track. This train then proceeded to the crossover track where it crossed over onto the track on which the two-diesel unit was located. The backward movement of the two-diesel unit was started while the crossover movement of the other train was in progress and when it was partly on the same track that the two-diesel unit was; the backward movement of the two-diesel unit was started with a sudden jerk which knocked plaintiff off balance in the center of the northerly most engine. According to plaintiff, the full power of the diesels was applied in making the backward movement. Plaintiff started to call out, "hold it," but, before he could do so, the two-diesel unit ran into the side of the freight train which was making the crossover movement. A power pole had been knocked down as a consequence of the collision (R. 38). A fire was started with a great deal of light. At this juncture the plaintiff jumped from the cab in order to reach a place of safety (R. 43).

The backward movement of the two-diesel unit was about 480 to 500 feet before the collision with the crossover train occurred.

A few days before the accident, defendant had issued a bulletin, known as "Bulletin 69," which prohibited power

test movements on a main track such as the one on which the two-diesel unit was then being operated (R. 61, 45).

The defendant also had a rule established by custom and practice which was to the effect that no back-up movement on the main track should be made without getting a train order authorizing the movement. The rule also specified precisely how the backward movement was to be made and is shown by plaintiff's testimony at pages 40 and 41 of the Record as follows:

“Q. Now, under those conditions, Mr. Reiner, is such a movement a safe movement?

A. No, because it was making a movement against the current of traffic which is not practicable or practical or is never made.

Q. If you were informed by either Mr. Moore or by Mr. Meyers, the engineer, that they wanted to make a back-up movement like what was made at that time, what was the custom and practice to be followed by you or any other pilot herder?

A. Well, the only way it could be made on a main line would have to be to have a train order and go back and flag, send a man back on the main line to protect against other trains which would be coming and might be coming at any time, which they was there all the time, keep coming from the other way. You have to have somebody there to flag, to flag the movement.

Q. Would you have to have permission from anybody to make such a movement?

A. Yes, you would have to have permission from either the Yardmaster, which would be in our case, there is no trainmaster there, or the operator have a train order or something. He should have something.

Q. How would that have been done by you?

A. I would not have made that move under no conditions that way. If they had wanted to have gone back, I would cross over onto the other eastern main line, and we would have went back (12) that way, which was the proper way to have went.” (R. 40-41.)

As the foregoing excerpt shows, no such train order was given and no compliance with the terms of the rules was even attempted before the backward movement was made. In his closing argument, counsel for the defendant in effect admitted that the backward movement was wrongful but he blamed plaintiff for it. So far as his admission that the backward movement was wrongful is concerned, it reads as follows:

“What is involved in this case? It involves a case where one train’s rearend backs and runs into another train. Somebody certainly was off base. Somebody certainly made a mistake here.” (R. 214.)

During the trial, defendant was permitted to elicit from plaintiff, over plaintiff’s objection, that plaintiff had retired on a pension. The testimony relative to this matter is (R. 68-69) :

“Q. Mr. Reiner, you have retired at the present time, haven’t you?

Mr. Rerat: That’s objected to as incompetent and immaterial.

Mr. Gearin: You have retired on a company retirement—

Mr. Rerat: That’s objected to as immaterial, incompetent, and irrelevant—just a minute, please, I have an objection—

Mr. Gearin: I will tie it up, your Honor.

Mr. Rerat: Your Honor, I would like to finish.

The Court: Is it offered on the issue of damages?

Mr. Gearin: Well, it has to do with some other part about which I may impeach the witness, your Honor.

The Court: Well, if it’s offered for impeachment purposes, that’s all right, but not if it’s offered on the issue of damages.

Mr. Gearin: I am not offering it on that issue of damages at all, your Honor.

The Court: Well, the jury will understand that whether a man is retired on a pension or not has nothing

to do with whether or not he is entitled to recover in a suit such as (44) this. In any event, if you find that he is entitled to recover, this has nothing to do with the amount he is entitled to recover.

Mr. Gearin: I offer it for a limited purpose, your Honor."

Thus, it appears that the evidence as to the plaintiff's retirement pension was received, not as a defense, but, rather, for purposes of impeachment. A motion to strike the testimony relative to the pension was denied (R. 10). The trial court instructed the jury that it might consider the fact that the plaintiff had a pension in determining whether the plaintiff would have continued to work in the future and, hence, whether the plaintiff had sustained loss of further earnings. The instructions are as follows (R. 274) :

"You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find (62) him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have gone on working had he not been injured, and, hence, is relevant to the issue of whether or not he has lost any future earnings."

Thus, it appears that the evidence as to the pension was not used for the purpose of impeaching the plaintiff but rather for the purpose of showing that, in all likelihood, plaintiff did not sustain a loss of future earnings, which was the basis of his claim. The trial court, in its instructions, stated to the jury the plaintiff was seeking compensation for "loss of earning power" and, if entitled to recover, was entitled to damages sustained by reason of such loss (R. 274).

Counsel for the defendant, in his closing argument, did not make one comment to the effect that the evidence relative to the pension in any way *impeached* plaintiff but rather contended that on the merits plaintiff should not recover because he had a pension. The very last words which counsel uttered in his closing argument were (R. 215) :

“I have perhaps talked too long. I have tried not to. You have been on juries for a long period of times. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people (160) who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don’t think, in fairness, that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you.”

SPECIFICATION OF ERRORS

1. The Verdict is contrary to law and the evidence.
2. The Judgment is contrary to the law and the evidence.
3. The Court erred in denying plaintiff’s Motion for a new trial.
4. The Court erred in failing to instruct the jury that the defendant was liable as a matter of law.
5. The Court erred in failing to instruct the jury that any contributory negligence on the part of the plaintiff should be considered only in litigation of damages rather than complete and total defense.
6. The Court erred in receiving evidence over plaintiff’s objections that the plaintiff had and was receiving a retirement pension.
7. The Court erred in instructing the jury:

“You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find (62) him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have gone on working had he not been injured, and, hence, is relevant to the issue of whether or not he has lost any future earnings.”

8. The Court erred in failing to instruct the jury to entirely disregard the following portion of the closing argument of defendant's counsel (R. 215) :

“I have perhaps talked too long. I have tried not to. You have been on juries for a long period of time. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people (160) who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think, in fairness, that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you.”

9. The Court erred in failing to instruct the jury to entirely disregard the statement in the closing argument as follows (205-206) : “I can understand why they brought Mr. Rerat back here from Minneapolis because he certainly makes a beautiful argument to you people” as being an appeal to local passion and prejudice.

10. That the Court erred in denying plaintiff's objections to the following portion of the closing argument of the de-

fendant's counsel and the plaintiff's request that the jury be instructed to disregard (R. 212) :

"Is there some reason why we have had one, two lawyers from Minneapolis, one from Seattle, one from Portland, trying this case for the plaintiff with large photographs, aerial views, blown-up things like those claims in a complaint for considerable sums of money, for doctor and hospital bills when there is no justification or reason for it?

Mr. Rerat: Just a minute, Counsel. I want to object to such testimony on the grounds it is prejudicial, your Honor, and ask that the jury be instructed to disregard it.

The Court: Proceed (157)."

as an appeal to local passion and prejudice and as permitting defendant's counsel to comment on the attorneys who were not actually participating in the trial.

11. The Court erred in failing to instruct the jury that there was a difference between a "pilot-herder" and a "pilot" and as to the respective responsibilities of a "pilot-herder" and a "pilot," as was shown by the Record.

12. The Court erred in denying plaintiff a new trial, for which plaintiff moved, upon the grounds that defendant was guilty of misconduct by bringing before the jury the question, the fact that the defendant had instituted an investigation of the accident in question in which plaintiff was charged at being at fault and in which he was disciplined (73-74).

13. That the Court erred in denying plaintiff a new trial upon the grounds that the plaintiff had been deprived of a fair and impartial trial by reason of the cumulative effect of all the errors hereinbefore assigned.

AUTHORITIES DEEMED TO BE APPOSITE OR CONTROLLING

Point 1. Defendant Was Negligent.

Atlantic Coast Line R. Co. v. Johnson, (C.A. Ga. 1952), 199 F.2d 750, rehearing denied 200 F.2d 619.

Frabutt v. New York, C. & St. L. R. Co. (D.C. Pa. 1950), 88 F. Supp. 821.

Point 2. Plaintiff Was Not Guilty of Contributory Negligence.

Chesapeake & O. Ry. Co. v. Richardson (6 Cir.), 116 F.2d 860, cert. den. 313 U.S. 574.

Point 3. Trial Court Erred in Admitting Evidence as to Plaintiff's Retirement Pension.

Sinovich v. Erie R. R. Co. (3 Cir.), 230 F.2d 658.

Ring v. Mpls. St. Ry. Co., 176 Minn. 377, 223 N.W. 619.

Wise v. C. B. & Q. R. Co. Relief Dept., 133 Minn. 434.

El Paso El. Ry. Co. v. Murphy (Tex. Civ. App.), 109 S.W. Rep. 489.

Chic. G. W. Ry. Co. v. Peeler (8 Cir.), 140 F.2d 865.
45 U.S.C.A., Sections 55, 58, 228a.

Point 4. Error to Receive Evidence of Retirement Pension for Impeachment and Then Using It Generally.

88 C.J.S., Sec. 87, p. 195.

Point 5. Appeals by Defendant to Local Prejudice.

Anno.: 78 A.L.R. 1456.

ARGUMENT

SUMMARY OF ARGUMENT

Plaintiff contends that defendant's negligence appears as a matter of law for the reason that it appears without any dispute that the engineer made a power test on the mainline in violation of the rule promulgated by the defendant in Bulletin 49 about a week before the accident and in addition thereto violated the rule relative to not making any backup movements at the place of the accident without a yard order, and, finally, in making the backward movement without maintaining a lookout to avoid collision with a train which was making the cutover, and which was plainly visible to anyone who would have looked.

Plaintiff contends that he was not guilty of contributory negligence for the reason that he was under no duty to do anything at the time the accident occurred and, finally, was not guilty of any breach of duty so as to be guilty of contributory negligence.

Plaintiff contends that the Court erred in receiving evidence as to plaintiff's retirement pension for two reasons, viz.: 1. The matter of the pension was entirely irrelevant and immaterial to any issue before the Court; and, 2. The showing of the retirement pension enabled the defendant to escape liability in violation of *U.S.C.A.*, Title 45, Section 55.

Plaintiff further contends that he was deprived of a fair and impartial trial by reason of the conduct of counsel for the defendant who used the evidence relative to the pension, which was received for the sole purpose of "impeaching" the plaintiff, to argue that the defendant was not liable at all and by his appeals to local passion and prejudice by calling the jury's attention that one of plaintiff's counsel was from Minneapolis; by placing before the jury that plaintiff had

been subject to an investigation and trial and discipline as a consequence of the accident, and by utterly confusing the evidence relative to the distinction between a "pilot herder" and a "pilot."

I.

DEFENDANT IS LIABLE, AS A MATTER OF LAW, FOR NEGLIGENCE

U.S.C.A., Title 45, Section 51, provides that a railroad engaged in interstate commerce shall be liable for injuries to its employees, "resulting in whole or *in part* from the negligence of the officers, agents or employees of such carrier." A railroad company is guilty of negligence if it violates its working rules and is liable to its employees for any injury sustained as a direct and proximate consequence thereof.

Atlantic Coast Line R. Co. v. Johnson (C.A. Ga. 1952), 199 F.2d 750, rehearing denied 200 F.2d 619.

Frabutt v. New York, C. & St. L. R. Co. (D.C. Pa. 1950), 88 F. Supp. 821.

Myers v. Southern Pac. Co. (1936), 58 P.2d 387, 14 Cal. App.2d 287, rehearing denied 59 P.2d 1001, 14 Cal. App.2d 287.

McCrowell v. Southern Ry. Co. (1942), 20 S.E.2d 352, 221 N.C. 366.

As held in *Topore v. Boston, Maine R. R.*, 78 N.H. 536, 537, 103 Atl. 72, 73, the adoption of such rules "admits the reasonable necessity for the conduct thereby prescribed."

While Moore testified that the backward movement was not a power test, the testimony as to what actually happened shows the movement was a power test and nothing else.

There is no dispute at all as to the fact that a train order was required to authorize such a movement and that such a train order had never been obtained. The purpose of the

train order was to prescribe a course of conduct which would make the backward movement a safe one. If such an order had been obtained, it would have been the plaintiff's duty to get off the diesel, go forward, and flag the engineer of the diesel when it was safe to make the movement. All this was not done. Because of the omission to follow the prescribed course of conduct, the collision occurred.

In addition, the backward movement was made without any lookout at all. The fireman, Moore, sat in the cab at the front of the backward movement and should have seen the crossover train, but did not. The movement was made recklessly and in entire disregard of the safety of those on the diesel as well as those on the crossover train. It was one of those movements for which there was entirely no excuse and which establishes negligence as a matter of law.

II.

PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

The evidence shows without dispute that plaintiff was a "pilot herder" and not a "pilot." Under the circumstances he had no duty to perform. Furthermore, he was in a position where he could not make an observation and was absolutely at the mercy of Moore, who had got into the engineer's seat in the cab of the diesel, which was at the head of the backward movement. Moore was in the observation seat and not plaintiff. It would have been presumption for the plaintiff to have attempted to supersede Moore or to exercise any of Moore's functions with respect to lookout.

It is elementary that contributory negligence involved the idea of breach of duty—something of fault with the conduct of the employee. *Lynghaug v. Payte*, --- Minn. ---, 76 N.W. 2d 660.

Contributory negligence consists of the doing of some act by the employee, or some omission by the employee, amounting to want of ordinary care for his own safety, which is a direct and proximate cause of his injury.

Chesapeake & O. Ry. Co. v. Richardson (6 Cir.), 116 F.2d 860, cert. den. 313 U.S. 574.

Plaintiff was not guilty of contributory negligence for the plain reason that he was not under any duty which contributed to the accident. He had nothing to do with the forward movement of the engineer which was made in violation of the rule prescribed by Bulletin 49 or the engineer's violation of the rule requiring a yard order authorizing the backward movement and the failure of the fireman Moore to maintain a lookout. Plaintiff could not have prevented any one of these acts. If he had attempted to do so, it is a certainty that the engineer and the fireman would have entirely disregarded it. Furthermore, plaintiff was under no duty to maintain a lookout while the backward movement was being made for the reasons: 1. The plaintiff was put in the position by Moore where he could not make an observation; and 2. Moore had taken over the function of maintaining lookout with the consequence that plaintiff was excluded from any part of the function of maintaining a lookout.

Furthermore, it is to be remembered that under Section 53 contributory negligence on the part of an employee is not a bar to recovery, but diminishes the damages only in proportion to the amount attributable to such contributory negligence.

It must be apparent that any alleged contributory negligence of the plaintiff was very slight indeed as compared to the negligence of the defendant. In any aspect of the case, plaintiff was entitled to recover, even if he was guilty of some contributory negligence, which the plaintiff denies.

III.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE TO THE EFFECT THAT PLAINTIFF HAD A RETIREMENT PENSION

a. The Evidence as to the Retirement Pension Was Entirely Irrelevant and Immaterial and Its Admission Was Prejudicial.

The case was tried upon the theory, in so far as future damages were concerned, plaintiff had sustained injury consisting of "loss of earning power" (R. 274). The evidence as to future earnings was admitted upon the theory that the perspective earnings measured the extent of the loss so occasioned.

Vicksburg & M. R. v. Putnam, 118 U.S. 545, 7 S.Ct. 1, 30 L.Ed. 257.

15 *Am. Jur.*, *Damages*, Sec. 91.

In a personal injury action, evidence that the plaintiff was receiving, at the time of trial, a pension, insurance, annuity, or other income, which became due to him as a result of the accident causing his injuries or otherwise, is entirely immaterial and irrelevant to the issue and it is error for the Court to receive the same in evidence.

Standard Oil Co. v. U. S. (9 Cir.), 153 F.2d 958.

Sinovich v. Erie R. R. Co. (3 Cir.), 230 F.2d 658.

New York, N. H. & H. R. Co. v. Leary (1 Cir.), 204 F.2d 461, 468.

Flener v. Louisville & N. R. Co. (7 Cir.), 198 F.2d 77.

Hetrick v. Reading Co., 39 F. Supp. 22, 25.

Ring v. Mpls. St. Ry. Co., 176 Minn. 377, 223 N.W. 619.

Wise v. C. B. & Q. R. Co. Relief Dept., 133 Minn. 434.

Rodell v. Relief Dept. C. B. & Q. R. Co., 118 Minn. 449.

As held by this Court in *Standard Oil Co. v. U. S.*, *supra*, where the question is discussed at length and the authorities

are carefully reviewed in an opinion by Circuit Judge Bone (153 F.2d 958) :

“In the United States the prevailing rule seems to be that an injured person may recover for wages lost and medical expenses incurred during his incapacity even though such amounts were supplied by insurance, a contract of employment, or gratuitously.”

In *Ring v. Mpls. St. Ry. Co.*, supra, a member of the city fire department was injured in an automobile collision. The trial court excluded evidence that the fireman was entitled to a city pension. The Minnesota Court held that the pension “had no relation to his future earning capacity” and affirmed the decision. The Court said :

“The refusal of the court to permit defendant to introduce evidence as to plaintiff’s right shortly to receive a pension is assigned as error. *Whether plaintiff would or would not, at some time in the future, receive a pension had no relation to his future earning capacity. It had nothing to do with the amount he could be awarded as damages. The proffered evidence was properly rejected.*

“We have examined other rulings of the court on the admission of evidence and find no error therein.” (Italics supplied.)

As said in *El Paso El. Ry. Co. v. Murphy* (Tex. Civ. App.), 109 S.W. Rep. 489, where the plaintiff was injured while riding as a passenger on one of the defendant’s street cars, in holding that it is entirely immaterial whether or not the injured plaintiff would ever work at the employment in which he was engaged at the time he was injured :

“A loss or impairment of earning capacity is one of the elements which may be considered by the jury in estimating the damages one has sustained from a personal injury. And in order that it may be considered for that purpose there must be some evidence tending to show what such capacity of the injured party was before its loss or impairment. Where one’s earning ca-

capacity is not destroyed, but only impaired, the damages he has sustained can be best shown by what he was capable of earning before he was injured and what he was capable of earning afterwards, and the difference will indicate the damages he has sustained. It must be observed that the matter to be determined is not what he actually earned before his injury, but what his earning capacity actually was, and to what extent that capacity has been impaired. For whatever capacity he had for earning money before the injury, whether he exercised it or not, was his, and he was entitled to it unimpaired by injury wrongfully inflicted by another. One who has impaired the earning capacity of another, when called upon to redress the wrong, cannot be heard to say: 'You had ceased to use your capacity to earn money when I injured you, and would not have exercised it again had you not been injured.' One's earning capacity is property, and in some instances all he has, and he can no more be deprived of it without just compensation than he can of tangible property. It would certainly be no defense to an injury of tangible property that its owner had ceased to use it, and would not, had it not been injured, ever have worked with it any more. It is a matter of no concern to anybody else whether one uses or intends to use his property for the purpose of earning money or not. It is his, and it is the duty of the state to protect him in it, unimpaired from injury by the wrongs of another, or to compel him who has wrongfully impaired the value of its capacity for use to compensate the owner for such impairment. For these reasons the appellee was entitled to recover from the appellant the difference between the value of his earning capacity before and after it was impaired by the injury wrongfully inflicted by the appellant. After he moved from Corpus Christi to El Paso he did not engage in any kind of business, and maybe did not, up to the time of his injury, have any intention of doing business there; but this, as we have seen, did not deprive him of the right to compensation for the impairment of his capacity to earn money, if he had such capacity, caused by the injuries inflicted by appellant's negligence."

These decisions make it crystal clear that the trial court erred in holding, as it instructed the jury at page 274, that such evidence may be considered in connection with the question of whether the plaintiff would have gone on working had he not been injured. That matter is one which has nothing to do with the plaintiff's right to recover for injury to his working capacity. It was prejudicial in the extreme for the trial court to admit the evidence and then instruct the jury it might consider it.

b. Admission of Evidence Relative to Plaintiff's Retirement Pension Was in Contravention of U.S.C.A., Title 45, Sections 228a, 55 and 58.

Phila., B. & W. R. Co. v. Schubert, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911.

Chi. G. W. Ry. Co. v. Peeler (8 Cir.), 140 F.2d 865.

Wise v. C. B. & Q. R. Co. Relief Dept., supra.

We do not feel it necessary to labor this point. The rules are well settled and have been stated in the cited cases. In *Chic. G. W. Co. v. Peeler*, supra, the United States Court of Appeals for the 8th Circuit held:

"The Railroad Retirement Act of 1937, 45 U.S.C.A. §228a et seq., provides that certain described employees 'shall * * * be eligible for annuities after they shall have ceased to render compensated service to any person.'

"Section 55 of the Employers' Liability Act, supra, provides:

"* * * That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to insurance, relief benefit, or indemnity that may have been paid to the injured employee * * * on account of the injury * * * for which said action was brought.

“Section 58. Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

“The question presented is interesting. It has been discussed by the courts in *McCarthy v. Palmer*, 2 Cir., 113 F.2d 721, 723, and in *Hetrick v. Reading Co.*, D.C. N.J. 39 F.Supp. 22. Neither case is helpful here. In the *McCarthy* case the question arose on an appeal from a finding of the court as a result of a stipulation, and in the *Hetrick* case on a motion to strike an affirmative claim for a set-off under the Act. In the present case no claim to a set-off is asserted in the answer. The objection, therefore, that the offered evidence was not material or relevant to any issue was properly sustained. Rules 8(c) and 13 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provide that affirmative defenses and counterclaims must be pleaded, and Rule 12(h) provides that ‘A party waives all defenses * * * which he does not present either by motion * * * or * * * in his answer or reply, with certain exceptions not material here. No demonstration is necessary to show that a set-off is a partial or entire defense to an action for damages.’ ”

In *Wise v. C. B. & Q. R. Co. Relief Dept.*, supra, plaintiff sued on a benefit certificate without filing releases of the railroad from liability. In holding that the filing of such releases was in effect prohibited by Section 55, the Minnesota Court said:

“The statute of 1908 was construed in *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U.S. 603, 32 Sup. Ct. 589, 56 L.ed. 911. This was an action by an interstate employee to recover for personal injuries. He had received benefits from the relief department. The regulations of the department provided that the receipt of benefits should operate as a release of damages for injury. It was held that the provision for a release was within the condemnation of the statute. The court said:

“ ‘But it is urged that the substituted provision—of §5 of the act of 1908—failed to embrace that which the earlier act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview “any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act.” It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms. * * * That is the liability which the act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute. “If there could be doubt upon this point, it would be resolved by a consideration of the proviso of §5, which immediately follows the language condemning contracts, rules, regulations or devices, the purpose of which is to exempt the carrier from liability.” ’ ”

× “The statute was construed by this court in *Rodell v. Relief Dept. C. B. & Q. R. Co.*, 118 Minn. 449, 137 N.W. 174. This was an action by the widow of a deceased interstate employee to recover upon a benefit certificate. Under the terms of the membership no death benefit was payable, until releases of the railroad company by all who might legally assert claims for the death were filed with the superintendent. The plaintiff brought

suit on the benefit certificate without filing releases. The defense was that she was not entitled to recover until releases were filed. It was held that in view of the statute quoted releases could not be exacted and the plaintiff could recover the death benefit."

c. Defendant Was Guilty of Misconduct in the Use of the Evidence Relative to Plaintiff's Retirement Pension.

The effect of the closing argument of defendant's counsel with respect to plaintiff's retirement pension was both devastating and prejudicial. His very last remarks to the jury were as pointed out above:

"I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don't think in fairness that you people should say that we should be penalized or that we are responsible for his condition of permanent disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you."

The last quotation was the very end of counsel's argument. It was not made to impeach plaintiff, but to discredit entirely his case.

In the case of *Sinovich v. Erie Railway Co.*, supra, the United States Court of Appeals for the Third Circuit, in discussing the harm done there by keeping before the jury the fact of plaintiff's retirement upon pension, said, in granting a new trial (230 Fed. 662):

"We think that the whole situation resulted in bringing and keeping before the jury the harmful misstatement that the plaintiff was receiving a pension from the defendant. * * * Plaintiff's attorneys perhaps should have requested the court to repeat what it had said to the effect that the Railroad Retirement Act payments were not to be considered in computing plaintiff's losses but the jury had been so advised once. There is not the slightest indication that those attorneys were speculating on the outcome or doing other than their best for

their client. Under all the circumstances it seems to us that the last moment reiteration by the defense of the barred evidence gravely and unwarrantably impaired the worth of plaintiff's claim to the jury. He is entitled to a new trial.'

"What is said in this quotation applies here. The claim of impeachment is too thin a disguise to conceal that defendant's real purpose was to discredit plaintiff's entire claim by irrelevant and immaterial evidence. The defendant's parting words to the jury were just that. No court should tolerate such a procedure to say nothing of the breach of faith and imposition upon the court, which counsel's conduct and argument involves. After all, plaintiff is entitled to a fair and impartial trial. This, defendant's counsel deprived him of."

IV.

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO REVERSE THE EVIDENCE AS TO PLAINTIFF'S RETIREMENT PENSION FOR PURPOSES OF IMPEACHING PLAINTIFF AND THEN TO PERMIT ITS USE FOR OTHER PURPOSES

This rule is supported by a unanimity of authority wherever it has been considered.

Brandt v. Penn R. Co. (7 Cir.), 231 F.2d 848.

In 88 C.J.S., *Trial*, Sec. 87, p. 195, the text reads:

"Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose. It is manifest that any other rule would result in surprise and injustice. Where a party offers evidence for a limited purpose, he is not bound by the evidence for another purpose. Where plaintiff offers evidence for a restricted purpose, it has been held both that defendant may and that he may not use it for another purpose without a second offer for such purpose."

Numerous cases are cited in notes 11 and 18 holding that, where evidence is admitted for a limited purpose, failure of the trial court to so limit it constitutes error.

Kucaba v. Kucaba, Neb. _____, 18 N.W. 645, 648.

V.

APPEALS TO LOCAL PREJUDICE AND PASSION BY DEFENDANT IN ITS CLOSING ARGUMENT CONSTITUTED MISCONDUCT ENTITLING PLAINTIFF TO A NEW TRIAL

The reference in the closing argument of defendant's counsel to plaintiff's attorney not as an "attorney," but as "lawyers" from Minneapolis had nothing to do with whether plaintiff was entitled to recover. This allusion to plaintiff's counsel was not an isolated act of misconduct, but, rather, was part of a plan consisting of numerous acts of misconduct, such as reference to plaintiff's retirement pension, his trial and discipline by defendant (for this there was no basis at all in the record), and the misuse of the evidence relative to the pension, all of which has a cumulative effect of causing plaintiff and his case to be prejudiced. Reference to the non-residence of a party is prejudicial error.

London Guarantee & Acc. Co. v. Woelfle (8 Cir.), 83 F. 2d 325.

Brotherhood of Painters, Etc., v. Trimm, 207 Ala. 587, 93 So. 533.

State v. Bernstein, 148 Minn. 301, 181 N.W. 947.

Hall v. Rice, 117 Neb. 813, 223 N.W. 4, 78 A.L.R. 1421. 88 C.J.S., Trial, Sec. 188, p. 373.

53 Am. Jur., Trial, Sec. 499, p. 403, note 8.

Anno.: 78 A.L.R. 1456.

The remarks of defendant's counsel had no tendency to explain the issues to be decided by the jury. They could not make any contribution to the attainment of justice. The sole purpose or effect of such appeals is to defeat justice. The remarks of counsel here could have no different effect under the circumstances. A new trial should be granted in order that this case may be tried right. As said in *State v. Bernstein*, supra, quoting from *Masterson v. Chicago & N. W. Ry. Co.*, 102 Wis. 571, 78 N.W. 757 (148 Minn. 308) :

“A case that cannot fairly be won upon the evidence by the use of legal and lawyer-like methods presumably does not deserve to be won at all.”

CONCLUSION

This is a case where defendant's negligence appears as a matter of law and where it appears that plaintiff was not guilty of contributory negligence as a matter of law. If the Court should hold, contrary to plaintiff's contention, that he was not guilty of contributory negligence as a matter of law, it should hold that his negligence was very slight as compared to the negligence of defendant, and that, consequently, plaintiff is entitled to a verdict making slight deduction for his own negligence.

The evidence relative to plaintiff's retirement pension and the use made thereof by the defendant utterly destroyed the strong case of negligence which the plaintiff had made. The evidence as to the retirement pension coupled with defendant's appeal to local prejudice were devastating and utterly deprived plaintiff of the fair and impartial trial that every litigant is entitled to.

In the interest of justice, there should be a reversal granting to plaintiff a new trial in which the element of prejudice referred to should be eliminated.

Respectfully submitted,

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NO. 15677

In the

**United States Court of Appeals
For the Ninth Circuit**

FRANK REINER, *Appellant,*

vs.

NORTHERN PACIFIC TERMINAL COMPANY
OF OREGON, a Corporation, *Appellee.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
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FILED

MAY 23 1958

PAUL P. O'BRIEN, CLERK

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NO. 15677

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APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

JURISDICTION

We adopt appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellant, as plaintiff in the district court, sued under the Federal Employers' Liability Act (45 USCA § 51) to recover \$85,000 general damages for injuries allegedly sustained as a result of defendant's negligence. Defendant's answer denied negligence and charged af-

firmatively that the sole cause of the accident was plaintiff's own negligence. These issues were submitted to the jury, which decided them adversely to the plaintiff, who has appealed.

STATEMENT OF THE EVIDENCE

As in most personal injury cases, the facts were in dispute. Appellant's brief sets forth in narrative form the evidence upon which he relied to sustain a recovery. The weight of evidence supported defendant's contention that plaintiff's negligence was the sole cause of the accident. The court instructed the jury (R. 271):

“If you should believe from the satisfactory evidence that the plaintiff was guilty of negligence in any one of the particulars charged and that such negligence of plaintiff constituted the sole cause of his injury, then in that event the plaintiff cannot recover against the defendant in this case.”

It is clear that the jury, by its verdict, was convinced that plaintiff's negligence was the sole cause of the accident.

The movement which resulted in the accident was a back-up movement of two diesel units. Plaintiff, at the time of the accident, was riding in the rear unit. The testimony established that he himself was responsible for this movement. The complaint alleges (R. 4)

and the answer admits (R. 8) that plaintiff was employed as a pilot-herder. Plaintiff's witness Leap defined a pilot-herder as (R. 105):

“* * * a classification of a workman for, in this case, the Terminal Company, that pilots or herds the engines”

whose duty it was to keep a lookout and to take a safe course (R. 106) and who is responsible for the safety of the train. (Rule 106—R. 107)

Witness Leo B. Moore testified (R. 151):

“Q. Now, on the back-up movement who, if anybody, in the back of the unit in which you were riding was responsible for the movement?

A. The herder.

Q. Who would that be in this case?

A. Mr. Reiner.

Q. Who had responsibility for the—strike that—what, if any, authority did you have with respect to Mr. Reiner's duties and activities at that time and place?

A. Nothing at all.”

Plaintiff testified at his disciplinary hearing that *it was his duty to protect the train* (R. 77) and to protect the movement at a cross-over (R. 78). Plaintiff's witness Leap testified that plaintiff was obligated to protect the reverse movement (R. 148-149).

Plaintiff's witness Curtis testified that as a pilot-herder, plaintiff should have been alert (R. 138). He should have kept a lookout and protected the rear end (R. 138-139).

During the back-up movement plaintiff was in a position where, had he looked, he would have seen the other train on the track in time to stop the movement. He admitted (R. 71):

“Q. Were you looking?

A. No.”

and (R. 72):

“Q. Did you take any look at all as you were backing up toward the place where the accident took place?

A. No.”

Plaintiff testified that it was raining “pretty badly and you couldn't see through the windshield” (R. 72)—yet he did not turn on either of two windshield wipers in the cab (R. 72).

Plaintiff knew the position of the emergency valve in the cab but did not use it (R. 72). There was, in addition, a communication system to the engineer or

hostler by which he could have signalled the latter to stop the train (R. 72-73):

“Q. Do you know where the emergency valve is on those trains?

A. Yes.

Q. Did you use the emergency valve to stop?

A. No.

Q. Is there a buzzer to the hostler?

A. Yes.

Q. Did you use the buzzer that night?

A. No.

Q. Had you used the buzzer on prior occasions?

A. Yes.”

Just one press of the buzzer would have brought the train to a stop (R. 82).

Prior to the back-up movement, the dome light was on, which interfered with visibility to the rear during the back-up movement. Yet plaintiff did not concern himself with this fact and did not turn off the dome light (R. 73, 171).

The diesel unit on the rear was equipped with a headlight which, if it had been on bright beam, would have illuminated the train to the rear of the backing diesel units (R. 169). Yet, plaintiff directed that the

headlight be turned from bright to dim. Witness Moore, referring to plaintiff, testified (R. 150-151):

“Q. What, if anything was said about the rear headlight?

A. Yes, I walked back, he was sitting there, and where it was—the cab light was on, and then I asked where the headlight switch was as I couldn’t see in the row of buttons, and I turned it on bright, and he says, ‘You don’t make a reverse movement with the bright headlight on,’ so I then clicked it to dim.

Q. What, if any, effect would that have upon the visibility to the rear?

A. Well, when the headlight was on bright I could see all the switches all the way back was all clear, and when the headlight was clicked to dim you could only see the car in your unit in front of you.”

Again, the jury may well have found that plaintiff’s injuries were occasioned solely and entirely by his own negligence in jumping from the diesel unit after the collision was over. The complaint in this case (R. 5) and in the earlier case which was dismissed, his testimony (R. 46, 52 and 53) and his prior written statement (Ex. 26) support this verdict.

Appellant in his statement of facts refers to defendant’s Rule 69 and states (Br. 9-10) that it “prohibited power test movements on a main track such as the one on which the two-diesel unit was then being operated.”

The fact is that witness Moore testified (R. 169) that *the movement was not a power test*. This was a sharply disputed issue, which was resolved by the jury's verdict.

Appellant has omitted any reference whatsoever to one of the most important facts in the case, and understandably so. The complaint contained the usual allegations of permanent injury and sought to recover money damages for alleged expenditures of large sums of money for medical, hospital and nursing expenses. The latter claim was wholly unsupported by the evidence. Plaintiff's attorney (R. 28) in the opening statement claimed that plaintiff was "permanently and totally disabled," a representation subsequently demonstrated to be entirely false.

Plaintiff concealed from the jury and neglects to advise this court that *he had injured his back on a previous occasion (R. 72), had been treated by an orthopedist, and had worn a back brace for his injury*. The record reveals that he was examined by four doctors, the last only three days before the trial, and only the last doctor testified (R. 70). Plaintiff described a long and continuous period of inability to perform his work. He attempted to convince the jury that it was difficult even for him to move, and that it was difficult for him to walk. (See testimony of plaintiff's wife, Margaret Reiner, R. 145, and his own testimony, R. 69.)

Apart from the usual enthusiasm with which many persons assert their injuries, plaintiff's claim in this case amounted to fraud. For example (R. 69), he actively engaged in salmon fishing subsequent to the accident and won the employees' salmon derby with a 31-pound salmon. He went deer hunting and traveled extensively with his house trailer. The motion pictures exhibited to the jury revealed that plaintiff could and did engage in normal activities without pain, discomfort or limitation of motion. It is significant that plaintiff made no claim and does not now claim that the pictures were unauthentic, distorted or improper. In fact, plaintiff advised his treating orthopedist (R. 200-201) in October of 1955 that he had no pain in his back.

STATEMENT RELATING TO APPELLANT'S SPECIFICATIONS OF ERROR

Plaintiff's specifications of error Nos. 1, 2, 3, 12 and 13 do not present any issue for review by this court.

Answer to Specification No. 4:

The Court did not err in failing to instruct the jury that the defendant was liable as a matter of law.

Appellant has failed to set out the charge to the jury *totidem verbis* as required by Rule 18(2)(d) of this court, nor does the record or appellant's brief disclose

what instruction, if any, was requested by plaintiff or that a proper objection was made (as required by Rule 51 FRCP) after the court had instructed the jury.

Moreover, the evidence that plaintiff was in charge of the back-up movement and was responsible for the safety of the train, and that his negligence was the sole cause of the accident, made such a charge inapplicable.

This Court strictly enforces Rule 51. In *Daulton v. Southern Pacific Company*, 237 F2d 710 (CA9 1956), the court said:

“Here both sides were represented by lawyers, experts in the field. It is particularly just to apply Rule 51 and the Federal Rules of Procedure * * *.” (237 F2d 710 at p. 713)

Plaintiff’s attorney, Eugene A. Rerat, is no stranger to F.E.L.A. litigation and can properly be considered an “expert in the field.” See *The Atchison, Topeka and Santa Fe Railway Co. v. Jackson*, 235 F2d 390 (CA10 1956).

Answer to Specification No. 5:

The Court did not err in failing to instruct the jury that any contributory negligence on the part of the plaintiff should be considered only in litigation (sic) of damages rather than complete and total defense.

Plaintiff has wholly failed to comply with Rule 18(2)(d) of this Court and Rule 51 FRCP. Plaintiff failed either to request the instruction or to object to the court's instruction at the time of trial. However, the instruction was given (R. 272) and the specification is wholly without merit.

Answer to Specification No. 6:

The Court did not err in receiving evidence over plaintiff's objections that the plaintiff had and was receiving a retirement pension.

This specification of error will be discussed in the argument.

Answer to Specification No. 7:

The Court did not err in instructing the jury: "You will recall that there was evidence further here that the plaintiff is now on a pension. That was received on the sole issue of whether or not in the event you might find (62) him entitled to recover that he would be entitled to recover any loss or not of future earnings. Of course, the fact that a man is on a pension or the fact that a man has other sources of income is not a defense to his right to recover for personal injury, but the fact that a man has other sources of income is relevant to whether or not you might believe that he would have

gone on working had he not been injured, and hence is relevant to the issue of whether or not he has lost any future earnings.”

This instruction was requested by plaintiff:

“The Court: * * * I gave the instruction as you suggested. * * *” (R. 280)

This specification of error will be discussed in the argument.

Answer to Specification No. 8:

The Court did not err in failing to instruct the jury to entirely disregard the following portion of the closing argument of defendant’s counsel (R. 215): “I have perhaps talked too long. I have tried not to. You have been on juries for a long period of time. You have been here for some time, I know, and you probably have seen people that were hurt, people that were badly hurt, people (160) who had something the matter with them, and I suggest to you that Mr. Reiner has earned a well-deserved rest because he is now pensioned. He can do the things he has always wanted to do. He can hunt and fish all the time, but I don’t think, in fairness, that you people should say that we should be penalized or that we are responsible for his condition of permanent

disability when the evidence is uncontradicted that he hurt his back a long time ago. Thank you."

No request was made to instruct the jury to disregard that portion of counsel's argument, and no objection was made to the argument at the time of trial. This specification is no more than an afterthought.

Answer to Specification No. 9:

The Court did not err in failing to instruct the jury to entirely disregard the statement in the closing argument as follows (205-206): "I can understand why they brought Mr. Rerat back here from Minneapolis because he certainly makes a beautiful argument to you people" as being an appeal to local passion and prejudice.

The Court was not requested by plaintiff to instruct the jury to disregard that portion of counsel's argument, and no objection was made to the argument at the time of trial.

Answer to Specification No. 10:

That the Court did not err in denying plaintiff's objections to the following portion of the closing argument of the defendant's counsel and the plaintiff's request that the jury be instructed to disregard (R. 212): "Is there some reason why we have had one, two lawyers from Minneapolis, one from Seattle, one from Portland, trying this case for the plaintiff with large photographs,

aerial views, blown-up things like those claims in a complaint for considerable sums of money, for doctor and hospital bills when there is no justification or reason for it?

Mr. Rerat: Just a minute counsel. I want to object to such testimony on the grounds it is prejudicial, your Honor, and ask that the jury be instructed to disregard it.

The Court: Proceed (157)."
as an appeal to local passion and prejudice and as permitting defendant's counsel to comment on the attorneys who were not actually participating in the trial.

This specification of error will be discussed in the argument.

Answer to Specification No. 11:

The Court did not err in failing to instruct the jury that there was a difference between a "pilot-herder" and a "pilot" and as to the respective responsibilities of a "pilot-herder" and a "pilot," as was shown by the Record.

The Court was not requested by plaintiff to instruct the jury regarding the difference, if any, between a "pilot-herder" and a "pilot." Plaintiff has again wholly ignored Rule 18(2)(d) of this Court and Rule 51 FRCP.

SUMMARY OF ARGUMENT

A. Evidence of Retirement

The evidence relating to plaintiff's retirement was entirely proper and was offered solely for the purpose of impeachment to establish that plaintiff had no incentive or desire to return to work.

B. Jury Argument

The trial court did not abuse its discretion in permitting an argument to the jury which consisted of a fair appraisal and evaluation of the case as it related to plaintiff's attempt to "build up" both liability and damages.

C. Liability as a Matter of Law

The issues upon liability, i.e., negligence and contributory negligence, were for the jury's determination.

D. Alleged Misconduct

No objection was made prior to the verdict.

ARGUMENT

Evidence of Retirement. The question was:

"Q. Mr. Reiner, you have retired at the present time, haven't you?" (R. 68)

“Retirement,” according to Webster’s New International Dictionary (2d Ed), means, “to withdraw from office, public station, business, or the like * * *.” The term has been defined as meaning to “withdraw from active service.” *State Ex rel v. Love*, 95 Neb. 573 at p. 581, 145 NW 1010.

Plaintiff complains, because he was asked if he had “withdrawn from active service.” If he had voluntarily withdrawn from active service, such position would be totally inconsistent with his assertion at the trial that he wanted to but could not work, because of his alleged permanent and total disability resulting from the accident.

The information which defendant wished to elicit was offered solely for the limited purpose of impeaching the plaintiff by showing that he no longer desired to carry on his employment with the terminal company. It was offered to establish that his incentive to work was gone.

After it was made known that plaintiff had voluntarily withdrawn from service, the court instructed the jury (R. 69):

“The Court: Well, the jury will understand that whether a man is retired on a pension or not has nothing to do with whether or not he is entitled to recover in a suit such as this. In any event, if you find that he is entitled to recover, this has nothing to do with the amount he is entitled to recover.”

There was no objection to this instruction at that or any other time, nor was there any request for any other or different instruction on the subject.

Plaintiff claimed total and permanent disability, when in truth and in fact, the evidence demonstrated that he was not disabled. He called himself a cripple; yet the evidence demonstrated him to be an active hunter and fisherman who could engage in every-day activities with no disability whatsoever.

The defendant was entitled to go into the question whether plaintiff had any genuine desire to return to work, and to unmask plaintiff's attempt to hoodwink the jury (by feigned painful gestures and halting walk) into believing he was totally and permanently disabled, and that he had left defendant's employment by reason of these injuries.

The testimony relating to retirement was offered for the limited purpose of impeachment. It was not offered with respect to liability or damages. The court immediately and expressly instructed the jury that it was not received in connection with either of those two issues, and again, in accordance with plaintiff's attorney's request, the court, in its charge to the jury, repeated its admonition (R. 274).

The cases cited by appellant are all cases in which evidence of benefits under the Railroad Retirement Act

—*and there was no reference in this case to the Railroad Retirement Act*—was received *in order to mitigate damages*. The law is well settled that evidence of benefits received by an injured workman, regardless of the source, is not admissible to mitigate damages. Evidence of plaintiff's retirement in this case *was not offered to mitigate damages*, but was offered solely for the purpose of impeaching the suggestion that he left defendant's employment because of his injuries.

Any error (which is emphatically denied) could relate only to damages. Since the jury found no liability such suggested error is immaterial. See *Dow v. United States Steel Corp.* (3 Cir. 1952), 195 F2d 478—Jones Act; *Tracy v. Terminal R. Ass'n of St. Louis* (8 Cir 1948), 170 F2d 635—F.E.L.A.; *Daulton v. Southern Pacific Company* (9 Cir. 1956), 237 F2d 710 (Cer. Den.)—F.E.L.A.

Jury Argument. Little is needed to justify the argument which was made to the jury. Certainly the conduct of the trial is within the discretion of the trial court. It was obvious that plaintiff had exaggerated and distorted the evidence relating to liability and his injuries. The argument of which complaint is made refers to the number of lawyers and their locality. It will be remembered that plaintiff had even been sent to Seattle for a medical examination. The comments

were directed to the attorneys who were in evidence at the time of trial and the type of evidence introduced by them and the wholly unfounded claim for doctor and hospital bills.

There was no appeal to local passion or prejudice. Appellant in his brief complains because this was a comment upon the attorneys who were not actually participating in the trial. Mr. Lezak from Portland did participate during trial (R. 257) and it is not and will not be denied that Mr. Bardo, Mr. Rerat's associate from Minneapolis, and Mr. Owen A. Johnson from Seattle, the latter whose name appears as an attorney of record (R. 1) were in the courtroom assisting Mr. Rerat.

Liability as a Matter of Law. The authorities upon which plaintiff relies do not support his contention. In each case, the court held that the issues were properly determined by the jury. For example, in the case of *Frabutt v. New York, C & St. L. R. Co.* (DC Pa. 1950), 88 F.Supp. 821, we find this language at page 828:

“The questions of defendant's negligence and the deceased's contributory negligence was therefore necessarily for the jury, and it appears to me proper that the motion for directed verdict and for judgment notwithstanding the verdict should be denied.”

and in the case of *Chesapeake & O. Ry. Co. v. Richardson* (6 Cir. 1941), 116 F2d 860, cert. den. 313 U.S. 574, we find at page 864:

“The questions of assumed risk or appellee’s negligent act being the sole cause of his injury were for the jury.”

The essence of the jury’s function is to select from among conflicting inferences that which *it* considers most reasonable. *Eastman v. Southern Pacific Company* (9 Cir. 1956), 233 F2d 615 at 618.

In *Daulton v. Southern Pacific Company* (9 Cir. 1956), 237 F2d 710, cert. den., the case was tried to a jury. In affirming the jury’s verdict for the defendant, this court stated, at page 712:

“In view of the usual verdict returned for the plaintiff in cases of this type, it is surprising that the jury in this case did return a verdict for the railroad company. But it did. Now the plaintiff appeals.”

and at page 713:

“The lesson seems to be in *Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523, 76 S.Ct. 608, that the jury can choose any reasonable hypothesis and that the rule works both ways.”

Here, the evidence was disputed. The jury found no liability. The jury's verdict cannot be disturbed.

Alleged Misconduct—Investigation and Discipline

Plaintiff was asked about the company's investigation and the discipline imposed upon him by the company. The question was asked and *plaintiff's objection was sustained*. There was no motion for mistrial. It is obvious from the record (R. 74, et seq.) that the reference was made only to identify the hearing where plaintiff was represented by his brotherhood representative and where he made prior inconsistent statements. This specification is clearly an afterthought.

CONCLUSION

An examination of the record of this case will demonstrate that plaintiff has had a fair trial.

Respectfully submitted,

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No. 15683 ✓

United States
Court of Appeals
for the Ninth Circuit

W. S. PEKOVICH and ADMIRALTY ALASKA
GOLD MINING COMPANY, a Corporation,
Appellants,

vs.

MINNIE COUGHLIN, as Executrix of the Estate
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Appellee.

Transcript of Record

Appeal from the District Court for the
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Division Number One.

FILED

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JOSEPH A. McLEAN,
P.O. Box 1193, Juneau, Alaska.

For Appellee:

FAULKNER, BANFIELD & BOOCHEVER,
MR. BOOCHEVER,
P.O. Box 1121, Juneau, Alaska.

In the District Court for the District of Alaska,
Division Number One at Juneau

Civil Action No. 7605—A

MINNIE COUGHLIN as Executrix of the Estate
of ROBERT E. COUGHLIN, Deceased,

Plaintiff,

vs.

W. S. PEKOVICH and ADMIRALTY ALASKA
GOLD MINING CO., a Corporation,

Defendants.

COMPLAINT

1. Plaintiff is the executrix of the estate of Robert E. Coughlin, deceased, and has been authorized to file this suit by the U. S. Commissioner and Ex-Officio Probate Court at Juneau, Alaska, as executrix of said estate.

2. The defendant W. S. Pekovich is a resident of the Territory of Alaska and the defendant Admiralty Alaska Gold Mining Co. is a corporation organized under the laws of the Territory of Alaska.

3. On February 5, 1954, the said W. S. Pekovich, individually and as president of Admiralty Alaska Gold Mining Co., entered into an agreement with Robert E. Coughlin, deceased, a true and correct copy of which agreement is attached hereto as Exhibit "A," whereby four thousand shares of the Admiralty Alaska Gold Mining Co. stock was to be

issued to the said Robert E. Coughlin in the event that the said Robert E. Coughlin took care of the bookkeeping and other necessary things in connection with the Defense Mineral Exploration Administration Admiralty Alaska matter.

4. The said Robert E. Coughlin performed services as set forth in the agreement referred to above, but the said W. S. Pekovich and the said Admiralty Alaska Gold Mining Company, a corporation, have failed and refused to deliver the four thousand shares of stock as agreed.

Wherefore, plaintiff demands judgment against defendants ordering said defendants to deliver to the plaintiff four thousand shares of the stock of Admiralty Alaska Gold Mining Co., or in lieu thereof, the fair market value of said stock together with plaintiff's costs and disbursements herein.

Dated at Juneau, Alaska, this 11th day of Feb., 1957.

/s/ MINNIE COUGHLIN,
Executrix of the Estate of Robert E. Coughlin, Deceased.

United States of America,
Territory of Alaska—ss.

I, Minnie Coughlin, being first duly sworn according to law, depose and say:

That I am the executrix of the estate of Robert E. Coughlin, deceased; that I have read the fore-

going complaint, know the contents thereof, and that the facts stated therein are true and correct as I verily believe.

/s/ MINNIE COUGHLIN.

Subscribed and Sworn to before me this 11th day of Feb., 1957.

[Seal] /s/ R. BOOCHEVER,
Notary Public for Alaska.

My commission expires Dec. 10, 1957.

(Copy)

EXHIBIT A

Feb. 5, '54.

Admiralty Alaska Gold Mining Co.
Juneau, Alaska

Mine Office:

Funter Bay, Alaska.

Main Office:

Box 529, Juneau, Alaska.

Mr. R. E. Coughlin,
Juneau, Alaska.

Dear Bob:

This will confirm my understanding with you that if you take care of the bookkeeping and other necessary things in the connection with the D.M.E.A. Admiralty Alaska matter I will give you

in compensation therefor or cause to be given you 4,000 (four thousand) shares of the Admiralty Alaska Gold Mining Co. stock.

In Witness whereof, my hand.

/s/ W. S. PEKOVICH.

[Endorsed]: Filed February 11, 1957.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSE

Come now W. S. Pekovich and Admiralty Alaska Gold Mining Company, an Alaska corporation hereinafter referred to as "Admiralty Alaska," and for answer and affirmative defense to the plaintiff's complaint admit, deny, and allege as follows:

Answer

1. Defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph one of plaintiff's complaint.

2. Admit the allegations of paragraph 2.

3. Admit that shortly prior to February 5, 1954, an oral agreement was entered into between said W. S. Pekovich and said Robert E. Coughlin, in substance and effect as confirmed in a subsequent letter dated February 5, 1954, written by said W. S. Pekovich to said Robert E. Coughlin, a copy of

which letter is annexed to plaintiff's complaint and marked Exhibit A; deny that said W. S. Pekovich then was, or is now, president of Admiralty Alaska; allege that on or about May 28, 1954, subsequently to making said agreement of February 5, 1954, evidenced by plaintiff's said Exhibit A, the said Robert E. Coughlin elected to be paid in money instead of said Admiralty Alaska stock for his said services, and was so paid in full in money for all his said services, including payment in full in money for the months of February, March and April on May 28, 1954, and was not entitled to, and never claimed, said 4,000 shares of Admiralty Alaska stock, or any part thereof, for his said services or otherwise.

4. Admit that said Robert E. Coughlin performed services as alleged; admit the defendants have not delivered said 4,000 shares of Admiralty Alaska stock, or any part thereof, to said Robert E. Coughlin or to the plaintiff; and deny that the plaintiff is entitled to said 4,000 shares of Admiralty Alaska stock, or any part thereof.

Affirmative Defense

For affirmative defense to the plaintiff's complaint the defendants allege as follows:

1. That Admiralty Alaska Gold Mining Company, hereinafter called "Admiralty Alaska," is an Alaska corporation, and has mining property and a mine office at Funter Bay, Alaska; and at all times since October, 1951, has had an office in the Shattuck Building at Juneau, Alaska, and one part-time

employee to take care of the Admiralty Alaska's bookkeeping and other necessary things in connection with its Defense Minerals Exploration Administration matters and affairs, all at the compensation pay rate of \$75.00 per month.

2. That W. S. Pekovich is a stockholder in said Admiralty Alaska; and during all the times herein mentioned held no office in Admiralty Alaska excepting the office of general manager.

3. That at the annual meeting of Admiralty Alaska stockholders on February 5, 1954, Admiralty Alaska's then acting part-time employee resigned; and on February 5, 1954, the said Robert E. Coughlin was employed to take over and perform all the same part-time duties theretofore performed by said resigning employee, at the same compensation rate of pay, to wit, \$75.00 per month.

4. That on February 5, 1954, when said Robert E. Coughlin accepted and assumed such employment Admiralty Alaska was entirely without funds to pay him for said services in money; and accordingly it was agreed between said W. S. Pekovich and said Robert E. Coughlin that said W. S. Pekovich would give, or cause to be given, to said Robert E. Coughlin 4,000 shares of Admiralty Alaska stock to compensate the said Robert E. Coughlin for his services from February 5, 1954, to and until the next annual meeting of stockholders on February 5, 1955.

5. That at the February 5, 1955, annual meeting of Admiralty Alaska stockholders said Robert E. Coughlin was authorized to continue in said employment at the rate of \$75.00 per month; and he did so continue in said employment to and until the time of his death on September 22, 1955, at the rate of \$75.00 compensation per month; and ever since September 22, 1955, one Dapceovich has performed the same services theretofore performed by said Robert E. Coughlin, and his said predecessor, at the same rate of pay, to wit, \$75.00 per month.

6. That on or about May 28, 1954, Admiralty Alaska acquired funds sufficient to pay said Robert E. Coughlin for his said services in money instead of Admiralty Alaska stock; and thereupon the said Robert E. Coughlin elected to receive money instead of said stock for his said services; and, after withholding social security deductions, was so paid in money for his said services as follows:

| Check No. | Date | Purpose | Amount |
|-------------------------------------|----------|--------------------------------|-------------------|
| 474 | 5-28-54 | Salary—Feb., Mar., April, 1954 | \$ 225.00 |
| 547 | 9-28-54 | Salary—May, June, July, 1954 | 220.50 |
| 564 | 11- 4-54 | Salary—Aug., Sept., Oct., 1954 | 220.50 |
| 637 | 1- 7-55 | Salary—Nov. & Dec., 1954 | 147.00 |
| 651 | 2- 3-55 | Salary—January, 1955 | 73.50 |
| 663 | 2-16-55 | Salary—February, 1955 | 73.50 |
| 671 | 2-24-55 | Salary—March, 1955 | 73.50 |
| 706 | 4-11-55 | Salary—April, 1955 | 73.50 |
| 739 | 4-28-55 | Salary—May, 1955 | 73.50 |
| 792 | 6- 8-55 | Salary—June, 1955 | 73.50 |
| 821 | 7-11-55 | Salary—July, 1955 | 73.50 |
| 860 | 8- 9-55 | Salary—August, 1955 | 73.12 |
| 882 | 9- 8-55 | Salary—September, 1955 | 73.12 |
| Total salary paid February 5, 1954, | | | |
| to September 30, 1955..... | | | <u>\$1,473.74</u> |

7. That at no time between May 28, 1954, and the time of his death on September 22, 1955, did the said Robert E. Coughlin ever request, demand or claim 4,000 shares of Admiralty Alaska stock, or any part thereof, for said services referred to in plaintiff's said Exhibit A, or for any other services, for the reason that said agreement of February 5, 1954, had, as aforesaid, been superseded and nullified by his election to receive his compensation in money instead of said Admiralty Alaska stock.

Wherefore, defendants pray that plaintiff's complaint and action be dismissed and held for naught; and that defendants have and recover their costs and a reasonable attorney fee, and for any other or further relief merited.

/s/ JOSEPH A. McLEAN,
Defendants Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed March 1, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to be heard before the court, without a jury, on April 2, 1957, plaintiff being present in person and represented by her attorney, R. Boochever, and the defendant Sam Pekovich

being present in person and as general manager of the defendant Admiralty Alaska Gold Mining Co. and the defendants having been represented by Joseph A. McLean, of their attorneys, and evidence having been adduced in open court and arguments heard and the court having delivered its oral opinion, the court makes the following:

Findings of Fact

1. Plaintiff is the executrix of the estate of Robert E. Coughlin, deceased, and has been authorized to file this suit by the U. S. Commissioner and Ex-Officio Probate Court of Juneau, Alaska, as executrix of the said estate.

2. The defendant, W. S. Pekovich, is a resident of the Territory of Alaska and at all times relevant to this suit has been and is the general manager and principal stockholder of Admiralty Alaska Gold Mining Co., a corporation organized under the laws of the Territory of Alaska.

3. At a meeting of the board of directors on February 1, 1954, C. J. Ehrendreich, the secretary and treasurer and accountant for the Admiralty Alaska Gold Mining Co., resigned because he felt the salary of \$75.00 a month was inadequate. R. E. Coughlin was employed as secretary and treasurer and bookkeeper for the corporation to take the place of Mr. Ehrendreich.

4. Robert E. Coughlin was to receive \$75.00 a month as a salary and as an additional inducement

to have him perform the work, W. S. Pekovich entered into an agreement with Robert E. Coughlin, deceased, whereby Mr. Pekovich agreed that if Mr. Coughlin performed the bookkeeping and related services for the company in connection with a Defense Mineral Exploration Administration contract, that Mr. Pekovich would give or cause to be given to Mr. Coughlin four thousand shares of Admiralty Alaska Gold Mining Co. stock. The agreement referred to above was reduced to writing by Mr. Pekovich and was introduced into evidence as plaintiff's Exhibit 1 and is referred to by reference hereby.

5. It is admitted that Mr. Coughlin performed the services agreed upon.

6. Neither Mr. Coughlin nor his estate were ever issued the four thousand shares of stock referred to in the agreement.

7. Mr. Coughlin received a salary of \$75.00 a month during the period he was employed by Admiralty Alaska Gold Mining Co., being the period from February 1, 1954, to the date of his death in September, 1955.

8. There is insufficient evidence to prove that the defendant Admiralty Alaska Gold Mining Co., a corporation, authorized or ratified the agreement between Mr. Pekovich and Mr. Coughlin pertaining to the issuance of four thousand shares to Mr. Coughlin in consideration of his services.

From the foregoing facts, the court makes the following:

Conclusions of Law

1. Plaintiff has no plain and speedy remedy at law.

2. Plaintiff is entitled to a decree ordering the defendant W. S. Pekovich to transfer forthwith to the plaintiff four thousand shares of the common stock of Admiralty Alaska Gold Mining Co., a corporation, and awarding plaintiff its costs and disbursements herein, including a reasonable attorney's fee of \$340.00.

Done in Open Court this 3rd day of April, 1957.

/s/ RAYMOND J. KELLY,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 4, 1957.

In the District Court for the District of Alaska,
Division Number One at Juneau

Civil Action File No. 7605—A

MINNIE COUGHLIN as Executrix of the Estate
of ROBERT E. COUGHLIN, Deceased,

Plaintiff,

vs.

W. S. PEKOVICH and ADMIRALTY ALASKA
GOLD MINING CO., a Corporation,

Defendants.

DECREE

This matter coming on to be heard before the court, without a jury, on April 2, 1957, the plaintiff being present in person and represented by her attorney, R. Boochever, and the defendant, W. S. Pekovich, being present in person and as general manager of the defendant Admiralty Alaska Gold Mining Co., a corporation, and defendants being represented by Joseph A. McLean of their attorneys, and evidence having been adduced in open court, and arguments heard, and the court having delivered its oral opinion, and findings of fact and conclusions of law having been entered,

It Is Hereby Ordered, Adjudged and Decreed:

That the defendant W. S. Pekovich transfer and deliver to the plaintiff forthwith four thousand shares of common stock of Admiralty Alaska Gold Mining Co., a corporation, and

It Is Further Ordered, Adjudged and Decreed:

That plaintiff have judgment against the defendant W. S. Pekovich for plaintiff's costs and disbursements herein, including an attorney's fee of \$450.00.

Done in Open Court this 3rd day of April, 1957.

/s/ RAYMOND J. KELLY,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given: That the above-named defendants, W. S. Pekovich and Admiralty Alaska Gold Mining Company, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final decree herein dated April 3, 1957, and the whole thereof, and from the entry thereof on April 4, 1957, in favor of the plaintiff and against the defendant W. S. Pekovich and ordering the defendant W. S. Pekovich to deliver to the plaintiff 4,000 shares of common stock of Admiralty Alaska Gold Mining Company; and awarding judgment against the defendant W. S. Pekovich for plaintiff's costs

and disbursements herein and for an attorney's fee of \$340.00.

Dated: Juneau, Alaska, April 26, 1957.

ADMIRALTY ALASKA GOLD MINING COM-
PANY, A CORPORATION,

By /s/ W. S. PEKOVICH,
Its General Manager;

/s/ W. S. PEKOVICH,

In Pro Per and for Admiralty Alaska Gold Mining
Company.

Receipt of copy acknowledged.

[Endorsed]: Filed May 1, 1957.

[Title of District Court and Cause.]

STIPULATION RE PRINTING
TRANSCRIPT OF RECORD

It is stipulated by and between the respective parties herein: That in printing the record in this action for use in the United States Court of Appeals for the Ninth Circuit all captions should be omitted after the title of the action has been once printed, and the name of the paper or document should be substituted therefor. All other parts of the record should be printed.

Dated: Juneau, Alaska, May 1, 1957.

ADMIRALTY ALASKA GOLD MINING COM-
PANY, A CORPORATION,

By /s/ W. S. PEKOVICH,
Its General Manager;

/s/ W. S. PEKOVICH,
Defendants-Appellants.

/s/ R. BOOCHEVER,
Attorney for Plaintiff-
Appellee.

[Endorsed]: Filed May 1, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The court erred in overruling defendant-appellant's motion for non-suit based upon failure to prove a case, as shown on page 9 of transcript.

a. No showing was made as to value of contested corporate stock.

b. No conclusive showing that 4,000 shares of stock was an inducement.

c. No showing who was obligated for the 4,000 shares.

2. The court erred in admitting, over the objection of defendant, Plaintiff's Exhibit No. 3, defend-

ant's personal letter to Mr. Roden, an attorney, as shown on page 51 of the transcript.

3. The complaint and the evidence are insufficient to constitute a cause or support a judgment rendered by the court in these respects:

a. There was conclusive evidence that the corporation lacked funds to pay a \$75.00 salary to the plaintiff.

b. There is no competent evidence that either the corporation or its management knew that the plaintiff was drawing a \$75.00 monthly salary for himself.

c. There is no competent evidence to the effect that the alleged inducement offered by the general manager is not binding upon the corporation, as set forth in Finding No. 8.

4. The findings of fact and conclusions of law, together with the decree are not supported by the evidence.

Dated this 20th day of August, 1957.

/s/ JOSEPH A. McLEAN,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 21, 1957.

In the U. S. District Court for the District of
Alaska, Division Number One, at Juneau

No. 7605—A

MINNIE COUGHLIN as Executrix of the Estate
of ROBERT E. COUGHLIN, Deceased,

Plaintiff,

vs.

W. S. PEKOVICH and ADMIRALTY ALASKA
GOLD MINING CO., a Corporation,

Defendants.

REPORTER'S TRANSCRIPT
OF RECORD

Be It Remembered, that on the 2nd day of April, 1957, court having convened at 10:00 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for trial without a jury; the Honorable Raymond J. Kelly, United States District Judge, presiding; the plaintiff appearing in person and by Robert Boochever, her attorney; W. S. Pekovich, defendant, appearing in person, and both defendants appearing by Joseph A. McLean, their attorney; respective counsel having announced they were ready for trial; the following proceedings were had:

Mr. McLean: Before beginning, your Honor, I would like the record to show that I am appearing for Howard Stabler who, as the Court knows, is somewhat incapacitated to conduct the trial.

The Court: Yes. Very well. [1*]

Mr. Boochever: Your Honor, I assume you would like brief opening statements at this time?

The Court: Yes. I have read the file but——

Mr. Boochever: This case involves, is of the nature of, a specific performance for a contract action. It concerns an agreement between Mr. Pekovich and the Admiralty Alaska Gold Mining Company with Robert E. Coughlin, who is now deceased. The action is being brought by Mrs. Coughlin, the widow and executrix of the Estate of Robert E. Coughlin, deceased.

The plaintiff will show, and it is admitted, that in February, 1954, Robert Coughlin entered into an agreement with Mr. Pekovich, who was the manager of the Admiralty Alaska Gold Mining Company, and with the Company whereby he was to do the bookkeeping services and other services in connection with the Defense Mineral Exploration Administration contract and in exchange he was—he was getting a normal salary and then this specific agreement as an inducement for him to take the job—offered him four thousand shares of stock; and it is admitted that Mr. Coughlin did the work required of him until his death; and it is admitted that he never received the four thousand shares of stock; and that is what the Estate is suing for, to get those four thousand shares of stock.

Now, we feel that we will prove our case by proving the authority of the executrix to sue, proving

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

that the [2] agreement, which is admitted, that the work was performed and the shares not received. Now, there will be other issues, I know from the answer, that will come before the case. The defendants are contending that this agreement was later modified so that in lieu of the stock Mr. Coughlin was to receive a salary of seventy-five dollars a week—a month.

We believe that we can show definitely that there was no such modification and that the original agreement and at all times he was to receive the seventy-five dollars a month and that this four thousand shares was an added inducement for him to take the job at that small salary; and that, briefly, will be the plaintiff's case, your Honor.

The Court: Very well. Do you wish to make a statement at this time?

Mr. McLean: Very briefly. The Court will no doubt notice in the trial memorandum that has been filed that the letter from Mr. Pekovich and the Alaska Admiralty Mining Company is admitted, but in lieu of the four thousand shares of stock the plaintiff's intestate, Mr. Coughlin, drew cash, a seventy-five-dollar salary per month, which amended the contract in that respect. He drew that and in turn gave up his right to any of the stock. The contract, the letter, that the plaintiff relies on is self-explanatory; and the witness we intend to introduce is the party who actually wrote the agreement, and he, in turn, is the best witness as [3] to the transaction as to what it meant, but we intend to show, too, your Honor, that there is no question but what

Mr. Coughlin was fully compensated for all the services that he did render to the corporation without payment of the stock which he in turn had deliberately gave up to draw the cash salary instead.

Plaintiff's Case

MINNIE COUGHLIN

called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, please?

A. Minnie Coughlin.

Q. And, Mrs. Coughlin, are you the widow of Robert Coughlin? A. I am.

Q. And when did Mr. Coughlin die?

A. September 22, 1955.

Q. And are you the executrix of the Estate of Robert Coughlin, Deceased? A. Yes.

Q. Have you been authorized by the Probate Court at Juneau to bring this suit? A. Yes.

Q. I show you what purports to be a certified true copy of [4] the order of the Probate Court and ask you if you can identify that?

A. Yes; I can.

Q. Is that the order authorizing you to bring this action? A. Yes.

Mr. Boochever: (Handing document to counsel for defendants.)

(Testimony of Minnie Coughlin.)

Mr. McLean: No objection.

The Court: It may be received.

Mr. Boochever: I offer that as Plaintiff's Exhibit 1.

The Clerk: It is so marked.

PLAINTIFF'S EXHIBIT No. 1

In the Probate Court for the Territory of Alaska,
First Division, Juneau Precinct

In the Matter of:

The Last Will and Testament and Estate of
ROBERT E. COUGHLIN, Deceased.

ORDER

This matter coming on to be heard upon the motion of Minnie Coughlin, executrix of the estate of Robert E. Coughlin, deceased, for leave to file suit against Sam Pekovich and/or Admiralty Alaska Gold Mining Company, a corporation, good cause having been shown, it is hereby ordered that Minnie Coughlin as executrix of the estate of Robert E. Coughlin be and she is hereby authorized to file suit against Sam Pekovich and/or Admiralty Alaska Gold Mining Company.

Done in Open Court this 11th day of February, 1957.

/s/ H. C. LEEGE,
U. S. Commissioner and Ex-Officio Probate Judge,
Juneau Precinct.

(Testimony of Minnie Coughlin.)

United States of America,
Territory of Alaska—ss.

I, the undersigned U. S. Commissioner for the Juneau Precinct, First Judicial Division, Territory of Alaska, do hereby Certify that the foregoing is a full, true and correct copy of the original and/or official copy on file and of record in this office.

Witness my hand and official seal this 1st day of April, 1957.

[Seal] /s/ MARIE DAY,
Deputy United States Commissioner and Recorder,
Juneau Alaska.

Received in evidence April 2, 1957.

Q. (By Mr. Boochever): Mrs. Coughlin, do you know if your husband ever went to work for Admiralty Alaska Gold Mining Company?

A. Yes.

Q. And do you know if he ever entered into an agreement with the defendant, Mr. Pekovich, in regard to the work that he was to perform for Admiralty Alaska Gold Mining Company?

A. Yes; he did.

Q. Do you know what the agreement was?

A. It was that he should primarily do bookkeeping. However, that was extended considerably.

Mr. McLean: Your Honor—— [5]

(Testimony of Minnie Coughlin.)

The Court: Wait a minute.

Mr. McLean: At this time I would like to insert an objection. The witness has stated she knows, but I believe, your Honor, it would be proper for the plaintiff to either introduce the basis on which she knows—I don't like to be objecting to irregularities. I suppose it is all preliminary and leading up to tangible evidence, but I think we should find out how she knows and——

The Court: I think it is dangerous to get into a narrative recital, Mr. Boochever. I think that the witness should confine herself to direct answers to the questions and not recite the whole story. You may be getting into the realm of inadmissible evidence.

A. Well, I haven't, have I? I thought I was just answering the direct question.

Q. (By Mr. Boochever): Well, Mrs. Coughlin, do you know if your husband entered into a written agreement at one time with Mr. Pekovich?

A. Yes.

Q. I show you what purports to be a letter from Mr. Pekovich, written on Admiralty Alaska Gold Mining Company, to Mr. Coughlin and ask you if you can identify that?

A. Yes; I can.

Q. What is that?

A. Well, it is a statement, an informal letter, addressed [6] to Mr. Coughlin, promising four thousand shares of Admiralty Alaska stock for——

Q. Certain services?

A. ——certain services.

(Testimony of Minnie Coughlin.)

Mr. Boochever (Handing document to counsel for defendants): I request that this be introduced as Plaintiff's Exhibit No. 2.

The Court: Any objection?

Mr. McLean: No.

The Court: It may be received.

The Clerk: It is so marked.

Feb. 5-54

ADMIRALTY ALASKA GOLD MINING CO.
JUNEAU ALASKA

MINE OFFICE:
FUNTER BAY, ALASKA

MAIN OFFICE
Box 529, JUNEAU, ALASKA

Mr R. E. Doughlin.
Junior Stocker

Dear Bob

This will confirm my understanding with
you that of you. Take care of the Bookkeeping and
other necessary things in the connection with the
D & A. Admiralty Alaska matter. I will
give you in compensation that four or. Come
to be given you 4.000 four thousands shares,
of the Admiralty - Stocker Gold. might stock
in return. etc. of my hand.
W. J. Peacock

P.H.F.'s EXHIBIT NO. 2
RECEIVED IN EVIDENCE

APR 2 1957

IN CAUSE NO. 3605-9
By W. J. Peacock Clerk
Deputy

(Testimony of Minnie Coughlin.)

Mr. Boochever: Your Honor, it might be advisable if we read that letter at this time. I think the handwriting is a little difficult to read because Mr. Pekovich's handwriting is somewhat like mine and is hard to make out.

Mr. McLean: We will waive reading of it.

Mr. Boochever: Well, I thought it might help the Court, except that, I guess, it is attached to the pleadings.

The Court: It is attached to the pleadings. Unless you have some question about it, we will——

Mr. Boochever: The copy, I think, is admitted as true, so I think that will cover it all right.

Q. (By Mr. Boochever): Now, Mrs. Coughlin, do you know if your husband performed the services he was supposed to perform under that agreement? [7]

A. Yes; he did.

Mr. McLean: I object, your Honor. I believe, again, that we are getting into the realm of——

The Court: I think that is a conclusion, Mr. Boochever.

Q. (By Mr. Boochever): Do you know if your husband ever received the four thousand shares of stock?

A. He did not.

Q. And would you have known from your relationships with your husband? Did he tell you if he got anything of that nature?

A. Yes; he did.

The Court: Well, it is admitted, that he didn't get it, in the pleadings.

Mr. Boochever: Very well, your Honor. The plaintiff rests, your Honor.

The Court: Cross-examine?

Mr. McLean: No cross-examination, your Honor.

The Court: You may step down.

Mr. Boochever: Your Honor, we feel we have made out a prima facie case at this time and in view of the admissions in the complaint, and we rest.

Mr. McLean: Your Honor, I am somewhat surprised to some extent at the limited amount of evidence that the plaintiff has introduced. I wish at this time to move for non-suit. [8]

In the first place, the only evidence actually on record is this letter, and the letter has indicated just the one element of compensation for certain work. Apparently, the plaintiff is relying upon a statement that he had performed certain work for the corporation, and, I believe, your Honor, that the witness has actually brought out the fact that, this particular letter, an agreement was entered into, but there is no indication that any other compensation was paid to him, as the Court has no doubt noticed from the pleadings that there was other compensation, and, since it has not been actually explained to the Court by the plaintiff in her case that no compensation at all was received, then I believe there is not sufficient evidence, your Honor, to support any further case on the part of the plaintiff.

I think at this time we are entitled to non-suit for failure to make out a case, especially in the light of

an affirmative defense that has been made a part of the record.

The Court: Well, that, of course, is a matter of defense. I believe that we have the situation here of this letter, which is the basis of the suit, the admission that the four thousand shares was not turned over as this letter said, and the testimony of the wife of the deceased that he did do the work to her knowledge. Now, that, I think, makes a prima facie case, and I will have to overrule your objection—your motion. [9]

Mr. McLean: Your Honor, at this time I would like to ask for a five-minute recess to consult with my client before presenting our case. I had several witnesses that I had asked to come up at 2:00 o'clock this afternoon. I had assumed that the plaintiff was going to occupy most of the morning. I have two witnesses here, however, and in the course of five minutes I will have the case laid out so that we can proceed, and I will ask for a five-minute recess.

The Court: Very well. I will give you a ten-minute recess.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; and the trial proceeded as follows.)

The Court: You may proceed.

Defendants' Case

WASO SIVIN PEKOVICH

called as a witness on behalf of the defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. McLean:

Q. For the record, Mr. Pekovich, would you give your full name?

A. Waso (W-a-s-o) Sivin (S-i-v-i-n) Pekovich (P-e-k-o-v-i-c-h).

Q. Are you the defendant in this action whose name was [10] spelled in the complaint P-e-c-k?

A. That is right. My initials, I signed initials —“W.S.”

Q. And the correct spelling of your last name is P-e-k instead of Peck?

A. That is right. No “c.”

The Court: P-e-k-o?

A. P-e-k-o; no “c.”

Mr. Boochever: Your Honor, I will move that the “c” be stricken from the name in the title of the case.

A. It can't be confused with anybody anyhow.

The Court: The motion will be granted correcting the name of the defendant.

Q. (By Mr. McLean): Mr. Pekovich, what is your connection with the Admiralty Alaska Gold Mining Company?

A. I am sorry to say, general manager.

(Testimony of Waso Sivin Pekovich.)

Q. How long have you been acting in that capacity? A. About forty years.

Q. Did you know Robert E. Coughlin?

A. Very well.

Q. How long have you known Mr. Coughlin?

A. Roughly, probably twenty-five years, or in that neighborhood; not exactly.

Q. Prior to February, 1955, did Mr. Coughlin have a position in the Company?

A. He was vice-president a few years before. I don't know [11] just how long.

Q. You have seen the Plaintiff's Exhibit No. 2, which purports to be a letter that you had written. Can you identify that as the letter you wrote to Mr. Coughlin?

A. Yes, I do; in my own handwriting.

Q. Did you write that in your capacity as general manager of the company? A. I did.

Q. Would you please tell the Court, Mr. Pekovich, prior to the time you wrote that letter what was the salary paid to the secretary-treasurer of the Company? A. Seventy-five dollars a month.

Q. What did that include?

A. All the work that was necessary in connection with that work that was done over there.

Q. Who was the secretary-treasurer prior to the date of this letter? A. Chris Ehrendreich.

Q. And you said his salary was seventy-five dollars a month. What did that include besides the ordinary bookkeeping of the Company?

A. Well, mostly bookkeeping and auditing of

(Testimony of Waso Sivin Pekovich.)

the books in compliance with the regulation of D.M.E.A. We were acting with D.M.E.A. money and required somebody that could keep correct accounts. [12]

Q. Did the secretary-treasurer furnish anything else?

A. Oh, he furnished his office and all that, that he was connected with. We didn't have an office of our own at that time.

Q. Now, at the time you wrote that letter to Mr. Coughlin you used the language "if you take care of the bookkeeping and other things in the connection with the D.M.E.A." Did you mean that he'd take over the work of secretary-treasurer?

A. Yes, I did.

Q. Your letter further reads, "I will give you in compensation therefor or cause to be given you four thousand shares of the" stock. What did you mean by that?

A. Well, "cause" to give him, I thought if the board of directors don't agree with my agreement that I would pay it myself, personally; that is why "I give you or cause to be given to you."

Q. But it wasn't actually the company—it was on behalf of the company that you wrote the letter?

A. Oh, yes.

Q. And why was it that you specified four thousand shares of stock?

A. Because at that time the company was practically to zero financially, and we had been struggling for a long time before to meet matching gov-

(Testimony of Waso Sivin Pekovich.)

ernment loans and all, and I [13] think we didn't have at that time in the bank only a few hundred dollars; Bob knows as well as I did, and probably better, because he was vice-president of the company; and I could not ask him to do the work for nothing, so I gave him the stock, which at that time was worth around eight hundred dollars.

Q. Mr. Pekovich, when you wrote the letter, did you intend that that be the salary for the work of secretary-treasurer? A. I did.

Q. Now, subsequently to that date did anything transpire as far as the secretary-treasurer's salary was concerned?

A. Soon after that time, I think the beginning of March, I went to New York. I raised about twenty-five thousand dollars of my own, which I put at the disposal of the company and at the disposal of Bob, and from that time on he drew the salary right along.

Q. And then you say he drew a salary?

A. Yes. He drew a salary of seventy-five dollars a month.

Q. Now, prior to the time he drew the salary and when you entered into this agreement or wrote the letter was the four thousand shares of stock for the salary? A. It was originally intended to.

Mr. Boochever: Well, I object to that, as the agreement shows what the intent was, your [14] Honor.

Mr. McLean: I would rely upon that, too, and agree that the letter is self-explanatory as far as

(Testimony of Waso Sivin Pekovich.)

the contents of it are concerned, but the witness is entitled to give his interpretation of it since he wrote it.

Q. (By Mr. McLean): Mr. Pekovich, you said that Mr. Coughlin drew a salary of seventy-five dollars a month while—after you had obtained some monies from New York?

A. The first two or three months he didn't draw the salary because he didn't have the money. Then he accumulated, drew accumulated, I think, two hundred and twenty-five dollars at one time, but it was covering from the time he took over.

Q. Did you consent to the withdrawal of that as a salary?

A. Oh, yes. I consented to that; and, as a matter of fact, if I had the money at that time, I wouldn't have asked him otherwise.

Q. And what was your understanding on the withdrawal of that salary in the form of cash?

A. That was a full compensation when he was drawing seventy-five dollars. That is the same salary as we paid before.

Q. And, if it was the same salary before, was it the same amount of work and office facility furnished?

A. I think, if anything, there was less work done during that time than during the first period, and during the first period the secretary-treasurer furnished his own [15] office and light and phone, whatever was necessary.

(Testimony of Waso Sivin Pekovich.)

Q. Did Mr. Coughlin furnish his own light and——

A. No. We hired our own office after that time and continued to do that.

Q. Now, in other words, you say the company was now furnishing an office and telephone?

A. That is right; and all facilities that was necessary. They expected clerical work.

Q. What was your understanding, Mr. Pekovich, after you noted that Mr. Coughlin was drawing the salary?

A. My understanding was it was paid in full, and that, I am quite sure, Bob's understanding also, because he never mentioned——

Mr. Boochever: I must object to that, your Honor. It is improper to state what another man's understanding was.

The Court: What the deceased understood will be stricken.

Mr. McLean: Do I understand by the Court's ruling that the Court is excluding any conversation this defendant had with the deceased?

The Court: If it is equally within the knowledge of the deceased and no other person, I expect we would.

Mr. McLean: I believe it is perfectly proper for the witness to tell the Court what conversation he had and what the deceased replied to him. [16]

Mr. Boochever: Your Honor, I have no objection to his relating any conversation with the deceased in view of our statute, Section 58-6-1, which

(Testimony of Waso Sivin Pekovich.)

permits such conversations, but I do object to his stating what the deceased understood, because he certainly can't tell what the deceased understood.

The Court: I appreciate your quoting me the statute. I didn't know that you had such a provision here. So, I do not exclude the testimony of the conversation, providing the words are used and not the conclusions.

Q. (By Mr. McLean): What conversation did you have with Mr. Coughlin with respect to withdrawing the salary, Mr. Pekovich?

A. Well, as a matter of fact, I don't know that we had any conversation, but we did have a conversation about assuming stock for the payment to following annual meeting.

Q. And what was the conversation, as best you can remember, as to Mr. Coughlin's claim on the stock after he had been drawing the salary?

A. He never did claim the stock.

Q. You say he—— A. No; he didn't.

Q. Can you recall what, in effect, Mr. Coughlin told you with respect to his claim on the stock?

A. He never told me anything. That wasn't brought up at all, one way or the other. After he started drawing [17] salary he finished that year that way. Then he started another year and was up to September on the same salary without any stock, without any other compensation except the seventy-five dollars a month.

Q. And do you recall any conversation as to whether he was satisfied with that?

(Testimony of Waso Sivin Pekovich.)

A. Well, of course, he was satisfied. If he wasn't, he wouldn't have to do it.

Q. Did Mr. Coughlin have other stock in the company, Mr. Pekovich?

Mr. Boochever: Wait a second. Your Honor, I think the statement "of course he was satisfied" doesn't answer the man's question, and it is again going into Mr. Coughlin's thoughts and so forth, which he can state any evidence that he has but he can't state whether the man was satisfied or not.

A. Well, the assumption is that, if he wasn't satisfied, he wouldn't have done it.

The Court: That is a matter for the Court to decide on the facts; and you, Mr. Pekovich, can testify as to what he stated to you in reference to your agreement on that occasion. Did you talk with him when you came back from New York with the money?

A. No; I didn't.

The Court: You didn't talk to him?

A. I didn't talk to him at all. [18]

The Court: Go ahead.

Q. (By Mr. McLean): Mr. Pekovich, after you returned from New York did you discuss the financial condition of the company with Mr. Coughlin?

A. He knew it better than I did because he was secretary-treasurer.

The Court: That doesn't answer the question, Mr. Pekovich.

A. I did not.

(Testimony of Waso Sivin Pekovich.)

The Court: You don't know what he knew and you can't look into his mind. We can't——

A. I am sorry.

Q. (By Mr. McLean): Mr. Pekovich, though, did you ever discuss with Mr. Coughlin the amount of money in the bank after you came back from New York?

A. I did. The only money that was in the bank was what I put in myself.

Q. And did you tell, or did Mr. Coughlin indicate to you that he deposited that money in the bank?

A. Oh, yes; I think he did. He borrowed that money, put it in the bank, and paid the bill. That is the only money that the company had.

Q. Mr. Pekovich, now, since you were the general manager of the company, did you work closely with Mr. Coughlin, as secretary-treasurer? [19]

A. In a sense, no; and I wasn't working with the secretary-treasurer before either. They had their own business, and I had mine.

Q. Did you not share the same office, Mr. Pekovich?

A. No. I was the most of the time over at the mine.

Q. Now, you say that, I believe your testimony earlier, Mr. Pekovich, was that Mr. Coughlin also owned stock in the company; is that true?

A. Yes. I gave him one thousand shares free to qualify him as a vice-president, I think, two or three years previous to that.

(Testimony of Waso Sivin Pekovich.)

Q. About what year would that be?

A. Beg pardon?

Q. About what year was that?

A. A couple of years before that, probably 1952 or something like that; I couldn't tell exact, but our minutes would show that.

Q. Was that an outright gift to Mr. Coughlin?

A. Absolutely; to qualify him as a director.

Q. And did he perform the work normally done as a vice-president of the company or a director of the company?

A. Our directors and officers are not paid any stated salary at all.

Q. Did he attend the directors' meetings?

A. Yes; he did. [20]

Q. As a vice-president?

A. Yes, he did. But, I mean, there was no compensation paid to any officer or director.

Q. Let me ask you again, Mr. Pekovich—subsequent to the appointment of Mr. Coughlin as secretary-treasurer in February, 1954, was there any salary to be given to Mr. Coughlin as secretary-treasurer?

A. Seventy-five dollars a month, that was previously paid.

Q. Previously paid? A. Yes.

Q. Now, when you appointed Mr. Coughlin, was he to get seventy-five dollars a month salary when you appointed him?

A. I didn't appoint him. The board of directors appointed him.

(Testimony of Waso Sivin Pekovich.)

Q. Now, did you discuss with Mr. Coughlin what the salary was to be?

A. He knew that all the time.

The Court: Now, that, you see——

A. Well, I didn't.

The Court: How would he know if you didn't discuss it with him?

A. Because it was, I think, a part of the minutes, your Honor.

The Court: All right. Let's have the [21] minutes.

A. I think it is part of the minutes that he was paid seventy-five dollars a month, and the one previous was paid seventy-five dollars a month for a year and a half, too, and the one after him was paid seventy-five dollars a month. That was the established payment for the amount of work that was done.

Q. All right. Mr. Pekovich, why did you write the letter to give him four thousand share of stock then?

A. Because we didn't have the money and in lieu of salary.

Mr. Boochever: Your Honor, at this time I would like to make a demand on the defendants to produce the minutes of the corporation—they can do it at the noon hour if they don't have them here—for inspection.

Mr. McLean: I see no reason to bring out the minutes, your Honor. That isn't the question before the Court. The question before the Court is simply

(Testimony of Waso Sivin Pekovich.)

—was this four thousand shares of stock to be given in lieu of salary or in addition to salary.

The Court: Are you seeking to bind the corporation?

Mr. Boochever: Your Honor. I believe, in view of the witness' testimony that the minutes show the agreement to pay seventy-five dollars a month, that it might have some bearing on this. I don't know whether it would or not, but I think that I am entitled to inspect them and see if they do have a bearing on it. [22]

The Court: Do you contend that by this document the corporation is bound by this document?

Mr. Boochever: I think it is possible that it could be. I don't know, your Honor, without seeing it, but I contend that I am entitled to look at it and see.

The Court: The corporation is a defendant here, isn't it?

Mr. Boochever: That is right, your Honor; yes.

The Court: Well, I don't think the corporation could be bound unless they had approved the agreement. It is an ultra vires act on the part of an officer unless he had authority, and the authority must be shown.

Mr. Boochever: That is correct, your Honor, as far as the corporate liability is concerned; and the minutes would tend to show that, too; they could show that, as to whether it is binding on the corporation or just on Mr. Pekovich.

Mr. McLean: Your Honor, I still oppose the de-

(Testimony of Waso Sivin Pekovich.)

mand on the grounds that plaintiff's suit is one for specific performance, delivery of the stock, and, as to what the minutes might contain, I wouldn't be surprised if one of our later witnesses will testify as to what the records of the company are, but I see no point in——

The Court: I think the records of the company would be the best evidence. [23]

Mr. McLean: Well, the letter has been introduced by the plaintiff as the best evidence, the entire agreement, and I think that, if the plaintiff wants to seek a monetary compensation instead of what the agreement stated, that would be an altogether different case. The case is for four thousand shares of stock, your Honor, and not for——

Mr. Boochever: The complaint asked for four thousand shares of stock or their fair market value in lieu thereof if they aren't able to transfer the shares of stock.

The Court: Well, you haven't put on any testimony as to what the fair market value is.

Mr. Boochever: No, I haven't as yet, your Honor; I haven't done that; but that is in the complaint, and, as a matter of fact, we had orally stipulated—this isn't in the record—that, if it were necessary, we could put that on later if there was liability determined, but that isn't in the case yet, either. But I think that, regardless of that—what reason have they got to withhold permission to inspect the minutes? I mean, all of the modern rules

(Testimony of Waso Sivin Pekovich.)

permit the free inspection, and there is no reason shown at all, unless they want to hide something.

Mr. McLean: Well, your Honor, I don't want to be technical about this, but the plaintiff has already presented his case and he rested. It was within his right to subpoena and have one of the corporate officers present with records, [24] if necessary, and introduce that as part of his case, and I see no reason why, when the defendant is testifying, he should try to bring in evidence to support his case out of the defendants' portion of the trial, unless he can bring it out on cross-examination and——

Mr. Boochever: Your Honor, of course, we could serve a subpoena duces tecum on Mr. Pekovich in the noon hour if counsel feels that that is necessary, but I think the Court, in its power, can easily order them to do it before then.

The Court: I think they ought to have them here if they are available. If the demand is not complied with and if the Court agrees, which I do, they can introduce secondary evidence. But, the thing that strikes me here, you can't be strictly technical in one phase and not in the other. The action here is an equitable action for specific performance; isn't that the——

Mr. Boochever: It is a combined equitable and legal action, your Honor. It is for specific performance for the stock and then it also is in lieu thereof or in the alternative for the fair market value if they don't produce the stock.

The Court: Well, so far, here is what we have:

(Testimony of Waso Sivin Pekovich.)

Now, let's look at it coldly. We have a company that had ordinarily paid the secretary-treasurer for this work and other work the sum of seventy-five dollars per month, according to the testimony. The company was broke when they made this deal [25] with Mr. Coughlin, who had formerly been a vice-president and was very familiar with the situation of the company, so Mr. Pekovich, the defendant herein, wrote this letter. Thereafter, Coughlin, the deceased, drew seventy-five dollars per month. Now, certainly, he can't get both the stock and the money.

Mr. Boochever: Oh, your Honor, that is the whole point of our case, that he would never have undertaken to do this work for seventy-five dollars a month.

The Court: Well, it had been undertaken by——

Mr. Boochever: Well, it had; that is true; and the previous man quit; and the inducement was to give him the four thousand shares so that he would do the work for seventy-five dollars a month; and we will show that conclusively before——

The Court: Well, all right; you will have to show it conclusively.

Mr. Boochever: That is right; we intend to, your Honor.

The Court: All right. Well, I have analyzed it up to now, and that is why I think it is important that the records of the company be here.

Mr. McLean: We will bear that in mind, your Honor.

(Testimony of Waso Sivin Pekovich.)

Mr. Boochever: Well, I wonder if we could set a time for me to inspect them at 1:30, if that is satisfactory to counsel, at the Clerk of the Court's Office. [26]

Mr. McLean: Your Honor, to tell you the truth, I am not too familiar with the corporate records myself. I presume they are in town, and I think it can be done, and, certainly, we will, if necessary, make what portions of the minutes apply to this case available, and we won't obstruct any justice in that respect.

Mr. Boochever: Well, I would like to see the minute books themselves for the period of 1954, all the year 1954.

Mr. McLean: I think we can get together on it at 1:30, your Honor.

The Court: Very well. You may proceed.

Q. (By Mr. McLean): Now, one other question, Mr. Pekovich, with regard to the secretary-treasurer's position prior to the time Mr. Coughlin took over. You said Mr. Ehrendreich was the secretary-treasurer? A. That is correct.

Q. Besides that work, did he do other work, or did he hold himself out in any professional capacity to do other work? A. I think he did.

Q. What is his title?

A. Certified public accountant.

Q. And you said he furnished the office space and other incidentals? A. He did. [27]

Q. And in February, 1954, the company appointed Mr. Coughlin. What background and train-

(Testimony of Waso Sivin Pekovich.)

ing did Mr. Coughlin have to your knowledge on accounting?

A. Oh, I think enough for that kind of purpose. I don't know if he was an accountant—I don't think—but he was a good bookkeeper and all that and——

Q. And you say that——

A. He was a purser on the boat for a long time and so he was accustomed to detail, I think.

Q. And you say he did the work in an office furnished by the company?

A. That is right.

Q. Did he do any other work in that office?

A. I think he was keeping the Pioneers' books.

Q. Anybody else's?

A. And his own business, I think.

Q. What is that business?

A. Island Transportation.

Q. And you say that he did the bookkeeping for those two groups in the office of the Admiralty Alaska Gold Mining Company?

A. I think so. And he was purser on the boat at the same time.

Q. And he also did that work in the office; is that what you say? [28]

A. Not only that, but he was out with the boat every week, you know, practically all week.

Q. Do you have any knowledge as to how much time this job actually took?

A. I don't. That depends on just how the necessities on his work.

(Testimony of Waso Sivin Pekovich.)

The Court: May I inquire here what "D.M.E.A." means?

A. Defense Mineral Administration.

Mr. Boochever: It is Defense Mineral Exploration Administration, your Honor, under the Department of Mines. It gives loans for exploration work on mining property, and they loan money on a basis of a certain percentage being paid by the company, and the Defense Mineral Exploration Administration advances the balance of the money necessary for exploring mining property.

The Court: Do they do that in gold mines, too?

Mr. Boochever: Various types of minerals and on different percentages, your Honor.

A. Nickel, copper and cobalt, primarily, in our case; and they furnish ninety per cent; we furnish ten per cent; and they changed the second loan to give us sixty-six and two-thirds against——

The Court: Well, I was misled by the word "Gold" in the name of the company. [29]

A. The name of the company is Admiralty Alaska, but we have nickel, copper and cobalt at the same time.

The Court: All right. Go ahead—we will take a short five-minute recess.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore; and the trial proceeded as follows.)

Q. (By Mr. McLean): Mr. Pekovich, Plain-

(Testimony of Waso Sivin Pekovich.)

tiff's Exhibit No. 2, the letter you wrote to Mr. Coughlin, carries the date of February 5, 1954.

A. That is the date of our meeting, the 10th or nearby.

Q. You remember that meeting and some of the particulars?

A. Oh, sure; I don't remember an exact date, but I remember it was in February, the first Monday in February.

Q. Now, Mr. Pekovich, can you recall what you said to Mr. Coughlin and what Mr. Coughlin said back to you when you handed this agreement to him?

A. Even before that particular meeting we knew that Mr. Ehrendreich was going to give up the position because him and I didn't get along very well, and it is a matter of fact, as far as I can recollect, Bob and I talked about it; we must stop because we didn't have any money, but we have to wait until the meeting; and as soon as the meeting was over I give him that in writing because, figuring that one of us or the other doesn't live, then [30] we have something in writing. That is my handwriting that nobody else can write that way.

Q. All right. Now, what did Mr. Coughlin say to you when you handed him this letter?

A. He was perfectly happy about it.

Q. What did he say? Can you recall any words?

A. I don't in exact words. But stock at that time was worth a whole lot more than one year's salary. It was around, I would say, twenty cents or twenty-

(Testimony of Waso Sivin Pekovich.)

five cents. Your Honor, it changes on the market from day to day, but it was at that time worth more than his salary for one year.

Q. Now, following that thought then, Mr. Pekovich, I would like to ask you what the value of four thousand shares of stock would be as of February 5, 1954?

A. Roughly, without the exact figure, I would say around one thousand dollars and in that neighborhood; nine hundred anyway. I think it was around twenty-two or twenty-three cents a share.

Q. Did the price change after February 5, 1954?

A. Oh, yes. The Security & Exchange started investigating the company, and then the stock dropped down, I think, below ten by April or May or something like that.

Q. Below ten cents a share, you mean?

A. That is right.

Q. In other words, the value of four thousand shares of [31] stock in April would be substantially lower than what it was in February?

A. It wasn't even half the price to my recollection, less than half the price at that time.

Q. Did you and Mr. Coughlin discuss that?

A. Well, he knows it.

Q. Did you talk with him about that?

A. Of course we did, every day. I mean, whenever we talk about the stock; we were fighting with the Security & Exchange. Bob was writing letters, and I was writing letters. And finally, when the

(Testimony of Waso Sivin Pekovich.)

company was cleared, the stock started going up again.

Q. Did you in April or May of 1954, did you and Mr. Coughlin discuss the value of four thousand shares and whether it had raised or dropped?

A. No. I think I was in New York by that time. I was raising money over there to send for him to operate the company.

Q. Now, I want to go back and ask you again, Mr. Pekovich, since this is direct examination, and I am not trying to suggest an answer to you, but I want you to tell the Court, Mr. Pekovich, your best recollection of what you said to Mr. Coughlin when you handed him this agreement and what he said to you.

A. Oh, as to that, my recollection on that is very clear. I [32] told him, "At the present time stock we cannot sell but is worth more than so many thousand or so many hundred dollars and is worth more than salary," and he agreed that stock eventually would go up.

Q. Did he say that?

A. Oh, yes, he did; and everybody else did, for that matter; and stock did go up after the Security & Exchange in July or August cleared the company from any blame, and then the stock went up, and, as a matter of fact, went up to a dollar or more, not at that time but just last summer. Stock is no stable value to it, up and down, traded in every day.

Q. And what did Mr. Coughlin say to you of his

(Testimony of Waso Sivin Pekovich.)

desire to have a certain number of shares of stock when he took the job as secretary-treasurer?

A. He was very happy about it.

Q. Did he say anything to you about the number of shares or anything like that? A. No.

Q. Whose idea was it—four thousand shares?

A. My own; to amply compensaate him under conditions that was at that time.

Q. Why did you put four thousand shares, that particular number?

A. Because it was in round figures approximately what his [33] salary would amount to.

Q. For how long a time?

A. Up to the next meeting, for one year.

Q. How often do the board of directors of the Admiralty Alaska Gold Mining Company meet?

A. Unless it is a special call, once a year, annual meeting.

Q. You say that your position is general manager. Who are the other directors of the company?

A. Mr. Roden; Henry Roden is president.

Q. Let me ask—where is Mr. Roden now?

A. I have no idea. He is in Seattle for all I know.

Q. Is he in Juneau?

A. No; not that I know of, unless he got in since yesterday.

Q. That is Mr. Henry Roden, an attorney in Alaska; is that who you mean?

A. That is right.

Q. Who is the name of another director?

(Testimony of Waso Sivin Pekovich.)

A. Jerry Williams is one of them.

Q. Is that Mr. Williams, the Attorney General of the Territory?

A. That is right. He is a vice-president.

Q. He is a vice-president. Who else is a director of the company? A. Burke Riley.

Q. Burke Riley is an attorney? [34]

A. From Haines; and he used to be from Juneau.

Q. Do you know where he is now?

A. He lives in Haines, I think. I saw him this morning but I think he lives in Haines.

Q. Who else is a director?

A. And Otto Erickson from Seattle, and Mr. Dapceovich over there.

Q. But at that time, in February, 1954, before Mr. Dapceovich entered the company, who was the other director?

A. I think Norman Stines was at that time director too. He is dead now.

Q. Can you recall who the other, the one remaining, director was? Could it be that Mr. Coughlin was a director?

A. Oh, yes; he was vice-president; sure, but I mean, I never was officially connected with the company at any time, so the directors that they have and officers and all that is outside of my line.

Q. At the time of the directors meeting in February, 1954, was the bank balance discussed at the directors meeting?

A. I presume it did, but that wasn't—I gave them a report on mining operation. No; for all

(Testimony of Waso Sivin Pekovich.)

practical purpose I was out of that. I have nothing to do with the business of the company or finances of the company. That is handled by the board of directors.

Q. And is it your testimony that the company was broke, or [35] about that, with the exception of a few hundred dollars, in February, 1954?

A. I think so.

Mr. Boochever: I think this is repetitive, and also it is a leading question, your Honor, and I object.

Q. (By Mr. McLean): What was the condition, the financial condition, of the company in February, 1955, one year after you signed this agreement?

A. You mean in '54?

Q. No. You signed this in 1954. One year afterwards what was the condition of the company?

A. I think it was much better; I think it was much better because we got quite a lot of money from that time one.

Q. Did Mr. Coughlin ever make a demand upon you for four thousand shares of stock?

A. He never did.

Q. Did Mr. Coughlin ever say anything to you about the four thousand shares of stock?

A. Not any more.

Q. Did he ever say anything to you about being satisfied with the salary?

A. No, not in that many words. I never asked that question. We never discussed that.

Q. But, certainly, you knew this letter was in

(Testimony of Waso Sivin Pekovich.)

existence, didn't you? [36] A. Oh, sure.

Q. Did you wonder where it was or ever ask him about it?

A. Well, if I may express it in my own words—I borrowed from Bob two thousand dollars and I gave him two thousand dollars back with six per cent interest, and he still has the note for all I know. He was a friend of mine for twenty-five years, and it isn't like dealing with somebody from the woods some place.

Q. By that you mean, Mr. Pekovich, that you repaid a two-thousand-dollar loan to Mr. Coughlin and never——

Mr. Boochever: I object.

A. No. He gave it to me.

The Court: I think the objection is well taken. That has nothing to do with this case. It may tend to show the relationship between the parties as to why they may have done some things in this case, but I don't think it is necessary to go into the particulars of that case, so I will sustain the objection.

Mr. McLean: No further direct examination. Your witness.

The Court: You may cross-examine.

(Testimony of Waso Sivin Pekovich.)

Cross-Examination

By Mr. Boochever:

Q. Mr. Pekovich, at all these times, I believe you said, you [37] were general manager for the Admiralty Alaska Gold Mining Company?

A. That is right; since 1916.

Q. And you had the authority to hire the bookkeeper for the corporation?

A. Not exactly bookkeeper; but I had to hire labor and anything like that, and the bookkeeper, as a matter of—I did, the bookkeeper on the mine; yes.

Q. And did you hire Mr. Coughlin as bookkeeper? A. No. The board of directors.

Q. The board of directors did?

A. It was the board of directors' function. They was the officers of the company.

Q. Were you at the board of directors meeting when he was hired?

A. I don't know that I was. I was at the annual meeting, but at the board of directors meeting I don't know that I was.

Q. That was the annual meeting of the stockholders or the board of directors?

A. Stockholders; and board of directors followed the stockholders meeting. I was at the stockholders meeting; yes.

Q. Did you say you made a report to the directors? A. Yes, I did.

Q. Then you were at the meeting, weren't you?

(Testimony of Waso Sivin Pekovich.)

A. Not to the directors; the stockholders and directors, an [38] annual meeting; then according to our bylaws the directors meeting followed that, after the stockholders meeting was closed.

Q. Now, you gave Mr. Coughlin this agreement, didn't you, on your own that was, and it was with the understanding that, if the board of directors approved it, why, then you would give him the stock, and, if not, why, you would give it to him yourself; is that right? A. That is correct.

Q. Did the board of directors approve the agreement? A. I never even asked them.

Q. You don't know whether they did or didn't then? A. No, I don't.

Q. Now, with reference to this agreement did you ever tell him that, "Here, you are going to get seventy-five dollars a month now in cash, and that is in place of your stock"?

A. Definitely not, but he——

Q. You never told him that?

A. He did that himself.

Q. Pardon me?

A. He did that himself.

Q. He drew the seventy-five dollars?

A. That is right.

Q. But you never told him, "Now, you are getting seventy-five [39] dollars. That is in place of the stock"?

A. No. We never discussed it.

Q. You never said that at all?

A. No; I never did.

(Testimony of Waso Sivin Pekovich.)

Q. Now, what is the present value of a share of stock in Admiralty Alaska Gold Mining Company?

A. Around sixty cents, I would say.

Q. Around sixty cents?

A. It is fluctuating back and forth.

Q. Actually, haven't the recent sales been for over seventy cents a share?

A. Oh, yes. Over ninety, over a dollar, not recent but last summer sometime.

Q. How many shares of stock are outstanding in Admiralty Alaska Gold Mining Company?

A. A little over six million, I think; six million three hundred thousand.

Q. And how many do you have yourself?

A. Well, that is my personal. I have nothing to do with it. I have enough to pay.

Mr. McLean: Your Honor, I can't see that this is a material question in this case.

The Court: I don't think it makes any difference how much stock he has.

Mr. Boochever: I think, your Honor, it shows a [40] little bit of Mr. Pekovich's—what he was doing at the time that he hired Mr. Coughlin. If he had thousands of shares, he could well afford to make this type of agreement, and it would be in addition to the salary. If he had five thousand shares himself, he wouldn't be apt to do it.

The Court: No. I don't think it makes any difference, Mr. Boochever. If I have a million shares of Ford Motor Company and am general manager of the Ford Motor Company, I couldn't do a thing

(Testimony of Waso Sivin Pekovich.)

as a shareholder that I couldn't do as general manager. It doesn't matter how much shares you have. His authority as general manager is what counts.

Mr. Boochever: Well, of course, this agreement was both as general manager and as an individual, as I understand the agreement, and that is my point.

The Court: Well, that is why I want to see the records, because, if you are going to hold the company, they have to approve that.

Mr. Boochever: That is right.

Q. (By Mr. Boochever): Now, who suggested that this agreement be in writing that is here, Mr. Pekovich?

A. All of my verbal agreements I reduced in writing as soon as I possibly can after it takes effect.

Q. In other words, all your verbal agreements have been reduced to writing so there is a record of them; is that right? [41]

A. If they are of any essential value; yes.

Q. And, therefore, you reduced to writing this agreement with Mr. Coughlin?

A. That is correct.

Q. But when you changed the agreement, or you say it was changed, you didn't reduce that to writing, did you?

A. I didn't change it. He changed it himself.

Q. He changed it?

A. That was given to him in lieu of salary, but

(Testimony of Waso Sivin Pekovich.)

it was entirely up to him which one to take, but we didn't have no money to take.

Q. Where does it say in the agreement, Mr. Pekovich, that it was in lieu of salary?

A. Where does it say that? Why, it is as specifically as I could explain it. It is there, what it was for.

Q. Well, there is nothing in the agreement that says it is in lieu of salary, is there?

A. But does it say that is in addition to?

Q. I am asking you if there is anything in the agreement that says it is in place of salary?

A. No.

Q. All right. Now, it is your contention that this agreement was changed, is that right, after you came back from this trip to New York?

A. Bob, after we get the money—I was still in New York—— [42]

Q. Yes. He drew a salary?

A. He took a salary.

Q. That is right. While you were still in New York? A. That is right.

Q. But did you come back and say, “Now, here, why are you drawing a salary when I have agreed to give you four thousand shares of stock”? Did you say that?

A. No, I didn't, because the stock was in lieu of money because they didn't have no money.

Q. Did you say then, “Well, give me back this agreement then now that you are drawing salary?”

(Testimony of Waso Sivin Pekovich.)

A. No, I didn't. He was my friend, and I wouldn't ask him for an agreement even now.

Q. Well, you gave him a written agreement just in case one of you should die or something of that nature, didn't you? A. That is right.

Q. Well, then, didn't you think it was equally important, if you changed the agreement, to get it back?

A. No, not necessarily, between a friend.

Q. Well, as a matter of fact, you know, don't you, that Bob at all times thought he was going to get that four thousand shares over and above his salary?

A. I know that Bob would never have asked for it, because he didn't during his lifetime. [43]

Q. Are you aware of the fact that he wrote to the Securities Exchange Commission about getting those shares long after this occurred?

A. He still had at that time, he still had, that promissory note for the stock, and he wrote to qualify himself as a director.

Q. Didn't he write——

A. And I wasn't there when he wrote anything about it, but I know there was a lot of writing.

Q. Don't you know that he wrote the Securities Exchange Commission in November of 1954, asking them about when they could release five thousand shares to him, the one thousand that he had been given when he was vice-president and the four thousand that you agreed to give him when he took the job of bookkeeper? A. In 1953?

(Testimony of Waso Sivin Pekovich.)

Q. In November, 1954?

A. No, I don't.

Q. You don't know that?

A. No, I don't.

Q. I will show you a letter from the Securities & Exchange Commission and ask you if this refreshes——

A. I have seen a good many of them.

Q. Take a look at that and see if it refreshes your memory as to whether Bob in November, 1954, Mr. Coughlin, [44] thought he was going to get those shares?

A. They wrote the letters to all the stockholders and officers and directors. They wrote me lots of them to.

Q. All right. But doesn't that letter show that Bob, Mr. Coughlin, thought he was to get five thousand shares in November, 1954?

A. I don't know if it does or not.

Q. Well, would you read it please and then tell me?

A. Well, you read it. You can read it better.

Mr. McLean: Well, I am going to object, your Honor, on the grounds that the question calls for a conclusion on the part of this witness as to what somebody thought. The letter itself is obviously inadmissible, and I don't believe that the cross-examination should be pressed on that point.

Mr. Boochever: Well, your Honor, I am trying to refresh the witness' memory here as to something that happened in 1954.

(Testimony of Waso Sivin Pekovich.)

The Court: Well, you are trying to refresh his recollection, however, with a letter that wasn't written by him or to him.

Mr. Boochever: Well, your Honor, the man's recollection, my understanding of the law, could be refreshed by anything, a newspaper article or anything at all, and, if it refreshes his recollection, that is all that is necessary. It isn't that he refresh—that the instrument used to refresh [45] the recollection isn't in evidence itself, but it says anything may be used in that regard.

The Court: Well, apparently, it doesn't refresh his recollection. You asked him what the document said.

Mr. Boochever: Well, I wanted him to read it and then see. He hasn't read it yet.

A. No, I haven't read it. That is definite. But I read a good many of them just like it sent to me and to other stockholders that they referred back to me.

Q. (By Mr. Boochever): About stock that they thought they were to get?

A. No. About the Security & Exchange investigation and trouble. That is why the stock dropped down.

Q. Well, I would like you to read this letter.

A. You read it to me. You can read better than I can.

The Court: Well, I don't want to hear it.

Q. (By Mr. Boochever): So, you read it yourself and then——

The Court: If it refreshes your recollection,

(Testimony of Waso Sivin Pekovich.)

then you can testify as to whatever it recalls to your mind, but, if it doesn't, why, you don't have to; but you read it to yourself.

Q. (By Mr. Boochever): Now, doesn't that refresh your recollection that in November, 1954, Mr. Coughlin thought he was to get five thousand shares of stock?

Mr. McLean: The objection goes, your Honor, as to [46] what Mr. Coughlin thought. It certainly was never discussed with this witness. It is just a conclusion that the plaintiff's counsel——

The Court: I don't think he can testify as to what Mr. Coughlin thought in this connection any more than he could in the other.

Q. (By Mr. Boochever): Didn't Mr. Coughlin speak to you about this matter, about wanting to get the five thousand shares of stock, Mr. Pekovich?

A. No, he did not.

Q. You don't recall that?

A. I recall a letter that I gave him, one thousand shares I gave him. At that time he could have, and I would say yes.

Q. But as to the other four thousand you have no recollection?

A. Not since the time I gave him that letter.

Q. And this of course, in November, 1954, was after you gave him the letter, wasn't it?

A. Yes. A lot of troubles; trouble started before then, in November, 1953, I think.

Q. So, you don't have any recollection of that and wouldn't know why the S.E.C. would be writing

(Testimony of Waso Sivin Pekovich.)

to him in that regard? A. No, I don't. [47]

Q. No. Now——

A. They said that he had a beneficial there, so I don't understand that beneficial, except insinuating.

Q. That he had an interest from an agreement that you would give him the stock; isn't that right?

A. Beneficial interest.

Q. Isn't that a beneficial interest from you to give him the stock?

A. No, not necessarily. He could hold that beneficial interest from somebody else; but I am not denying that he had my letter; that is correct.

Q. Now, Mr. Pekovich, Mr. Roden is the president of the corporation; is that right?

A. Yes; he is.

Q. And you have written to him about this matter, have you not? A. To Mr. Roden?

Q. Yes.

A. No, I didn't, that I recollect.

Q. You don't remember that?

A. Maybe I did, but I don't remember it

Q. Isn't it true that you wrote him a letter and that you at no time stated that the seventy-five dollars was in lieu of the four thousand shares?

A. That could be absolutely possible, because—— [48]

Q. That could be possible?

A. Oh, yes; it could be possible because the stock was given as full satisfaction.

Q. Pardon me? What was the last part of that?

(Testimony of Waso Sivin Pekovich.)

A. I said, the amount of stock that was given to him, that was to be complete remuneration for doing that work as stated in that note.

Q. Now, isn't it true that you discussed this with Mr. Roden and that you wrote to Mr. Roden and you never suggested that the stock was not an additional inducement over and above the seventy-five dollars a month?

A. I don't remember ever writing to Mr. Roden, but I probably did talk to him and tell him that I gave Bob four thousand shares for compensation because we didn't have any money.

Q. I will show you what purports to be a letter to Mr. Roden and ask you if you recognize the handwriting on that?

A. Yes; that is my handwriting.

Q. All right. Do you want to read that letter to the Court please?

Mr. McLean: I think, your Honor, that the witness should read it and determine the contents of it before it becomes a part of any evidence.

The Court: If he identifies it, it should be [49] introduced in the regular way, accordingly.

Mr. Boochever: Very well.

A. Yes.

Q. (By Mr. Boochever): That is your letter, isn't it? A. Yes. Do you want to read it?

Mr. McLean: May I see it?

Mr. Boochever: Yes (handing document to counsel for defendant).

Mr. McLean: Your Honor, I don't think this is

(Testimony of Waso Sivin Pekovich.)

admissible evidence. Certainly, the letter itself has no date. It is recognized by the witness, but I don't think it is timely. Perhaps, upon cross the plaintiff's attorney may want to bring out additional information, but by itself it is only an inquiry from one officer of the company to the other and much in the nature of a confidential or privileged document.

The Court: Of course, if it has no bearing on this case; but, if it has, I should think, as between an officer of the company and the general manager, the communication, having to do with any phase of this case that is before the Court, would be admissible.

Mr. McLean: I think it is a privileged document between the general manager and the president of the company as to a particular problem, and it is identified by this witness as a letter he wrote to Mr. Roden, all right, but I [50] don't think in itself it is admissible, and I would want to object on that ground, but I think the Court, however, should see the letter and determine its admissibility, all right, but I do want to assert an objection because I don't think it is material to the case and it is a privileged document between the two officers of the company and——

The Court: May I see it? Will you have it marked for identification?

Mr. Boochever: May I address myself to counsel's argument a minute on the privilege. There is no privilege I am ever aware of between officers of

(Testimony of Waso Sivin Pekovich.)

the corporation. I believe there is a doctor and client privilege and similar ones, but I don't believe there is any between directors or officers.

Mr. McLean: I would also want to remind the Court that the president of this company is an attorney, and no doubt he was seeking an attorney's advice on the matter too, and on the grounds that the document can reasonably be inferred to read a legal problem and a discussion of possible settlement or compromise, which in itself is not admissible.

The Court: Well, that of course is not admissible.

Mr. Boochever: No; there is nothing about settlement or compromise in it.

The Clerk: I have marked the exhibit Plaintiff's Exhibit 3 for Identification. [51]

The Court: (Reading the exhibit to himself) It may be received.

The Clerk: That will be No. 3 in Evidence then, Plaintiff's Exhibit No. 3.

ADMIRALTY ALASKA GOLD MINING CO.

MINE OFFICE FUNTER BAY

GENERAL OFFICE: BOX 529, JUNEAU, ALASKA

MARKED FOR
IDENTIFICATION

EXHIBIT NO. 3

EXHIBIT NO. 3
RECEIVED IN EVIDENCE

APR 2 1957

IN CAUSE NO. 7605-4

by W. L. L. L. Clerk

by W. L. L. L. Deputy

Mr. Henry Raden.
President R H & Co
Dear Mr. Raden.

Referring to the note I had given to Bob dated Feb. 6-54. in respect to the four thousand shares of the above Co. the note is very plain the stock has been promised in consideration of the work to be performed from the Books. it shows that Bob was receiving cash monthly compensation. The Books also show that he had drawn by cks. considerably more than the \$75⁰⁰ per month which was paid to Mr. C. J. Chandraich aside from that the Books also show considerable payments by the Company & cks. for which so far I was told by Bill Rauld. not find anything to offset it if under the circumstances Bob is entitled to stock the same would want to square up his accounts. 1st,

The stock can not be delivered before it is registered with the S.E.C., and that was known and agreed to by Bob. because he was coming on all the correspondence.

very truly yours
W. L. L. L.

(Testimony of Waso Sivin Pekovich.)

Q. (By Mr. Boochever): Mr. Pekovich, do you know about when this letter was written?

A. No, I don't. I didn't even notice the date on it.

Q. It isn't dated. It was written after the death of Mr. Coughlin, wasn't it? You can tell that by the contents of the letter, can't you?

A. I didn't even read the contents.

Q. All right. Will you look it over please?

A. What are you trying to make of that?

Q. I am asking you—was this written after the death of Mr. Coughlin?

A. I couldn't tell you.

Q. Doesn't it refer to the fact that there is a claim for this four thousand shares; isn't that what this letter is about? A. Yes.

Q. All right. Then, is it your contention it was written before Mr. Coughlin's death?

A. I couldn't tell you.

Q. You don't know whether it was written before his death?

A. No; I don't know whether it was before or after. It [52] could be written any time.

Q. Now, at no place in this letter do you state that he was not entitled to the four thousand shares because he got seventy-five dollars a month salary, do you?

A. No; but I did say that in lieu of that stock he was receiving seventy-five dollars a month.

Q. Will you show me where you say in lieu of the shares he was receiving?

(Testimony of Waso Sivin Pekovich.)

A. I don't say in lieu but it says the book-keeper——

The Court: I think the document plainly speaks for itself.

Q. (By Mr. Boochever): Now, if you thought he was receiving seventy-five dollars in place of the stock, why didn't you tell Mr. Roden in that letter?

A. I did, as I understand it.

Mr. Boochever: Well, I think the letter speaks for itself in that regard. A. That is right.

Q. (By Mr. Boochever): Have you ever been convicted of a crime, Mr. Pekovich?

A. Yes, I have.

Mr. McLean: Well, I object, your Honor, to any further examination on that line. This isn't a criminal case.

Mr. Boochever: I am not making any further examination on it. [53]

Mr. McLean: I object to it and move that the question be stricken and the answer as well for it has no bearing on this case.

Mr. Boochever: Well, our statute permits that as a regular impeachment of any witness. It is in our Code, that the question may be asked.

Mr. McLean: I believe it is primarily on a criminal matter, your Honor, and not on a civil case.

The Court: Well, let's see what the Code says. I have learned some law here this morning. Maybe I can learn more. This Code provides a lot of things.

(Testimony of Waso Sivin Pekovich.)

Mr. Boochever: Section 58-4-61, your Honor, is the section on it.

The Court: -4-61?

Mr. Boochever: Yes, your Honor.

The Court: "A witness may be impeached by the party against whom he was called, by a contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts; except that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime."

I think on the basis of impeaching a witness that the evidence may stand. [54]

Mr. Boochever: No further cross-examination.

Redirect Examination

By Mr. McLean:

Q. Mr. Pekovich, one question. At the time you and Mr. Coughlin discussed the four thousand shares of stock and at the time you wrote the letter, do you know whether Mr. Coughlin would have taken the job as secretary-treasurer without that?

A. You mean that I wrote that note?

Q. Yes.

A. Yes; we discussed it. During the month of January when we know that Mr. Ehrendreich was to resign, so to speak, we discussed that so that the office wouldn't be vacant.

Q. Would he have taken the job of secretary-

(Testimony of Waso Sivin Pekovich.)

treasurer without a promise of four thousand shares?

A. I think he would have because he was vice-president already and he would have because he——

Mr. Boochever: I must object to that, as to what he would have done. It is just pure conjecture.

The Court: It is argument also. I will sustain the objection.

Mr. McLean: No further redirect.

The Court: Anything further, Mr. Boochever?

Mr. Boochever: No, your Honor. [55]

The Court: You may step down. Call your next witness.

(Witness excused.)

WILLIAM S. DAPCEVICH

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. McLean:

Q. Give us your name, Mr. Dapceovich.

A. William S. Dapceovich.

Q. Where do you live, Mr. Dapceovich?

A. 302-5th Street, 5th and Franklin.

Q. In Juneau? A. In Juneau.

Q. Do you have a position in the Alaska Admiralty Gold Mining Company now?

A. I do.

Q. What is that position?

A. Secretary-treasurer.

(Testimony of William S. Dapceovich.)

Q. How long have you held it?

A. Since October of 1955.

Q. Was that shortly after the time, to your knowledge, that Mr. Coughlin passed away?

A. Yes, it is.

Q. In other words, you have been the secretary-treasurer [56] since Mr. Coughlin; is that right?

A. Yes.

Q. In your position as secretary-treasurer I assume that you have full control of the books and full knowledge working with them; is that right?

A. I do.

Q. Did you have occasion prior to the time you were appointed secretary-treasurer to go back into the books and determine what monies may have been drawn down by Mr. Coughlin?

A. Yes, I did.

Q. Did you make a list of the payments that Mr. Coughlin drew during the period February, 1954, up until the time you became secretary-treasurer?

A. I did.

Q. I hand you this document. Do you recognize it?

A. Yes, I do.

Q. Is that your signature?

A. It is.

Q. What is that, Mr. Dapceovich?

A. It is a statement of salary that was paid to Mr. Coughlin during the time of his employment with the Admiralty Alaska Gold Mining Company.

Q. And in one column I see you—before I ask that question—strike it, please. [57]

Mr. McLean: I would like to introduce this document as Defendants' Exhibit No. A and mark it for identification.

(Testimony of William S. Dapceovich.)

Mr. Boochever: I would like to examine it, if I may.

Mr. McLean: (Handed document to counsel for the plaintiff.)

Mr. Boochever: I have no objection.

The Court: It may be received.

The Clerk: The exhibit is marked Exhibit A.

DEFENDANTS' EXHIBIT A

Admiralty Alaska Gold Mining Co.
Juneau, Alaska

Mine Office:

Funter Bay, Alaska

Main Office:

Box 2642, Juneau, Alaska

Statement of Salary Paid Robert E. Coughlin, Deceased, During
Period of Employment—February, 1954, Through September, 1955, as Secretary-Treasurer With the Admiralty
Alaska Gold Mining Co.

| Check No. | Date | Purpose | Amount |
|--------------|----------|--------------------------------|-----------|
| 474 | 5-28-54 | Salary—Feb., Mar., Apr., 1954 | \$ 225.00 |
| 547 | 9-28-54 | Salary—May, June, July, 1954 | 220.50 |
| 564 | 11- 4-54 | Salary—Aug., Sept., Oct., 1954 | 220.50 |
| 637 | 1- 7-55 | Salary—Nov. & Dec., 1954 | 147.00 |
| 651 | 2- 3-55 | Salary—January, 1955 | 73.50 |
| 663 | 2-16-55 | Salary—February, 1955 | 73.50 |
| 671 | 2-24-55 | Salary—March, 1955 | 73.50 |
| 706 | 4-11-55 | Salary—April, 1955 | 73.50 |
| 739 | 4-28-55 | Salary—May, 1955 | 73.50 |
| 792 | 6- 8-55 | Salary—June, 1955 | 73.50 |
| 821 | 7-11-55 | Salary—July, 1955 | 73.50 |
| 860 | 8- 9-55 | Salary—August, 1955 | 73.12 |
| 882 | 9- 8-55 | Salary—September, 1955 | 73.12 |

Total Salary Paid\$1,473.74

(Testimony of William S. Dapcevich.)

Miscellaneous Reimbursements:

| | | | |
|-----|---------|---|-----------|
| 415 | 4- 2-54 | Itemized petty purchases | \$ 51.51 |
| 629 | 1-10-55 | Postage | 40.00 |
| 670 | 2-21-55 | Reimbursement—cash advanced to laborer | 12.26 |
| 815 | 7- 7-55 | Postage | 45.00 |
| 868 | 8-16-55 | Reimbursement—taxi fare | 3.00 |
| | | | <hr/> |
| | | | \$ 151.77 |
| | | | <hr/> |

ADMIRALTY ALASKA GOLD MINING CO.

By /s/ WILLIAM S. DAPCEVICH,
Secretary-Treasurer.

Received in evidence April 2, 1957.

Q. (By Mr. McLean): I notice one column is for explanation of the document. Mr. Dapcevich, you have a column entitled "Check No." Is that the number of the voucher that was issued by the company?

A. Yes. It is a combination of the check and voucher number.

Q. And in the next column you show dates. What does that date purport to be?

A. The date of the issuance of the check.

Q. And in the next column you show "Purpose." By "Purpose," where did you get that information?

A. That information was furnished on the check and voucher combination form. The lower portion of the check itself shows the explanation and the purpose for which the check is drawn.

(Testimony of William S. Dapceovich.)

Mr. Boochever: I would like to examine it, if I may.

Mr. McLean: (Handed document to counsel for the plaintiff.)

Mr. Boochever: I have no objection.

The Court: It may be received.

The Clerk: The exhibit is marked Exhibit A.

DEFENDANTS' EXHIBIT A

Admiralty Alaska Gold Mining Co.
Juneau, Alaska

Mine Office:

Funter Bay, Alaska

Main Office:

Box 2642, Juneau, Alaska

Statement of Salary Paid Robert E. Coughlin, Deceased, During Period of Employment—February, 1954, Through September, 1955, as Secretary-Treasurer With the Admiralty Alaska Gold Mining Co.

| Check No. | Date | Purpose | Amount |
|--------------|----------|--------------------------------|-----------|
| 474 | 5-28-54 | Salary—Feb., Mar., Apr., 1954 | \$ 225.00 |
| 547 | 9-28-54 | Salary—May, June, July, 1954 | 220.50 |
| 564 | 11- 4-54 | Salary—Aug., Sept., Oct., 1954 | 220.50 |
| 637 | 1- 7-55 | Salary—Nov. & Dec., 1954 | 147.00 |
| 651 | 2- 3-55 | Salary—January, 1955 | 73.50 |
| 663 | 2-16-55 | Salary—February, 1955 | 73.50 |
| 671 | 2-24-55 | Salary—March, 1955 | 73.50 |
| 706 | 4-11-55 | Salary—April, 1955 | 73.50 |
| 739 | 4-28-55 | Salary—May, 1955 | 73.50 |
| 792 | 6- 8-55 | Salary—June, 1955 | 73.50 |
| 821 | 7-11-55 | Salary—July, 1955 | 73.50 |
| 860 | 8- 9-55 | Salary—August, 1955 | 73.12 |
| 882 | 9- 8-55 | Salary—September, 1955 | 73.12 |

Total Salary Paid\$1,473.74

(Testimony of William S. Dapcevich.)

Miscellaneous Reimbursements:

| | | | |
|-----|---------|---|-----------|
| 415 | 4- 2-54 | Itemized petty purchases | \$ 51.51 |
| 629 | 1-10-55 | Postage | 40.00 |
| 670 | 2-21-55 | Reimbursement—cash advanced to laborer | 12.26 |
| 815 | 7- 7-55 | Postage | 45.00 |
| 868 | 8-16-55 | Reimbursement—taxi fare | 3.00 |
| | | | <hr/> |
| | | | \$ 151.77 |
| | | | <hr/> |

ADMIRALTY ALASKA GOLD MINING CO.

By /s/ WILLIAM S. DAPCEVICH,
Secretary-Treasurer.

Received in evidence April 2, 1957.

Q. (By Mr. McLean): I notice one column is for explanation of the document. Mr. Dapcevich, you have a column entitled "Check No." Is that the number of the voucher that was issued by the company?

A. Yes. It is a combination of the check and voucher number.

Q. And in the next column you show dates. What does that date purport to be?

A. The date of the issuance of the check.

Q. And in the next column you show "Purpose." By "Purpose," where did you get that information?

A. That information was furnished on the check and voucher combination form. The lower portion of the check itself shows the explanation and the purpose for which the check is drawn.

(Testimony of William S. Dapceovich.)

Q. Is this the exact wording that shows on the bottom portion [58] of the voucher or check?

A. Yes; I believe it is.

Q. And in the last column, "Amount," what does that purport to be?

A. That is the net amount of the check drawn.

Q. The net amount and the amount, in other words, that was actually received by the person to whom this check was issued; is that right?

A. That is correct.

Q. Were all these—who were all these checks issued to?

A. They were issued to Mr. Coughlin.

Q. Who signed the checks?

A. Mr. Coughlin.

Q. Did anyone else sign them? A. No.

Q. Do you base your testimony now upon your search of the records and your personal knowledge of what you saw on these cancelled checks?

A. I base my testimony on the direct examination of those documents.

Q. And you know of your own personal knowledge that that is what shows on the cancelled checks? A. Yes.

Q. There is no question in your mind about that?

A. There is no question in my mind. [59]

Q. In effect, Mr. Dapceovich, by "Salary," what does that show? I notice the amounts are slightly less than seventy-five dollars for most of the months; seventy-three-fifty, for example; how do

(Testimony of William S. Dapceovich.)

you explain the difference between seventy-three-fifty and what other item might be salary?

A. Well, I used the term "the net amount of the check" because those were salary payments and there were deductions for, I believe for, Social Security.

Q. In other words, the records would show the salary was figured at seventy-five dollars a month and a deduction taken out for Social Security, reducing it to seventy-three-fifty; is that right?

A. That is correct.

Q. With the exception of the one top item. The top item, Mr. Dapceovich, Check No. 474, marked "Salary," dated May 28, 1954, it is for two hundred and twenty-five dollars. You have a notation there that the check shows "Salary—Feb., Mar., Apr., 1954." Does that mean it was all taken out at one time?

A. That is correct.

Q. Farther down in this document, which is Defendants' Exhibit A, you have a column entitled "Miscellaneous Reimbursements." Is that a reimbursement to Mr. Coughlin or to whom? [60]

A. Reimbursements to Mr. Coughlin.

Q. And were they, too, signed by Mr. Coughlin?

A. That is right.

Q. And no one else? A. No one else.

Q. I hand you this document. Can you recognize that?

A. Yes.

Q. What is that?

A. Well, it is a statement of monies that are due the Admiralty Alaska Gold Mining Company for

(Testimony of William S. Dapceovich.)

the reason that is shown on the purpose for which the checks were drawn or for the reason that there wasn't sufficient information with the check to show for what purpose it was drawn.

Mr. McLean: Defendant wishes to introduce this document as its next exhibit, Exhibit No. B, and mark it for identification.

Mr. Boochever: I am going to object to this, your Honor, as irrelevant and not contained in the issues at all, and also it is not the best evidence. If he is going to testify about checks, he should produce the checks. I had no objection to the other, because we recognized that without any question.

Mr. McLean: Rather than make for a bulky record, introducing the checks themselves, your Honor, I believe it [61] is customary for an accountant, who identifies the transactions, to list them on one page, as long as they purport to be money only and no other purpose, that it is customary to introduce them in a summary form, and I feel that this particular matter is not objectionable. It runs to——

The Court: May I see it?

Mr. McLean (Handing document to the Court):——monies paid to the plaintiff's intestate.

The Court: These were checks, did I understand you to testify, on the corporation drawn by Robert E. Coughlin to himself? A. That is correct.

The Court: It may be received.

Mr. Boochever: Well, your Honor, my objection is that the checks themselves are the best evidence of that and the only evidence admissible in evidence

(Testimony of William S. Dapceovich.)

and that this witness can't come in with a list and say, "Here is a list of the checks." He has to produce the checks. They are the best evidence, and, if he produces them, then that is another question, but he hasn't produced them, and he can't come in with just any piece of paper and say, "There is a list of them." That is not the best evidence.

Mr. McLean: Well, your Honor, this witness has some of those records, but, since that isn't too bulky an item, I feel that the witness can get the checks, and we can [62] introduce them.

The Court: Well, all right. Probably it is the best evidence, the checks are.

Mr. McLean: I ask you, Mr. Dapceovich, to step down and to get the checks referred to in that particular exhibit.

Mr. Boochever: And I have a further objection, your Honor, that it is not within the issues of the case. I don't get what the purpose is, unless it is a counterclaim for additional sums of money——

The Court: Well, it could be.

Mr. Boochever: But there is no counterclaim in the case and——

The Court: Well, but there might be and could possibly happen, so, if they have the checks——

Mr. McLean: Your Honor, I only wish to state the reason for it is that counsel for the plaintiff has upon cross-examination brought out other matters which do not directly pertain to the one question which was originally presented to the Court, and, since they are going into that, I feel that this should

(Testimony of William S. Dapceovich.)

be brought out at this time and, if necessary, to amend the complaint, or the answer.

The Court: Well, I think that, if at all possible, the whole controversy should be settled in this litigation. I think there should be an end to litigation. If this Court can possibly get it all within this case, it would. [63]

Mr. McLean: Would you pick out those four checks (addressing the witness)?

This may remove your objection, Mr. Boochever (handed document to counsel for defendants).

Mr. Boochever: Well, I have to see it. Well, your Honor, these show checks in the amount specified, but there is nothing to show the purpose of the check drawn as indicated on this statement, and also this statement says "Statement of monies due the Admiralty Gold Mining Company by Robert Coughlin," which is purely a conclusion of this witness and is not—he can say "A statement of checks," if he wishes to, but it also shows "Purpose check drawn," and there is nothing on these checks showing the purpose, unless you have the vouchers somewhere else which——

A. I have the vouchers.

Mr. Boochever: ——which show that.

Mr. McLean: Do I understand the Court to also want the remainder of the carbon copy of this particular voucher? The witness in his sworn testimony said that this was what was contained on the statement.

(Testimony of William S. Dapceovich.)

The Court: Well, the check is the best evidence, and the voucher is only an explanation, which, I suppose, this document is an explanation. It might satisfy everybody though if you can find the——

Mr. McLean: Do you have those in court with you, [64] the remaining carbon copies of these?

A. No, I don't.

Mr. Boochever: If counsel will show them to me at 1:30, I will waive the objection in regard to the document being the same as stated on there, but I do not think that the explanatory remarks—since, this is tried before the Court, I have no objection to it; I know the Court won't consider that as permissible; but I object to those remarks that are on that paper, your Honor.

Mr. McLean: I have a number of other questions, your Honor, which will take another fifteen minutes of time besides cross-examination.

The Court: I have another matter at 1:30. We will suspend at this time until 2:00 o'clock, this particular case, and Court will recess until 1:30.

(Whereupon, the trial was recessed until 2:00 o'clock p.m., April 2, 1957, and resumed as per recess, with all parties present as heretofore.)

WILLIAM S. DAPCEVICH

resumed the witness stand:

Direct Examination

By Mr. McLean:

Q. Mr. Dapceovich, in your capacity as secretary-treasurer of the corporation did you have access to the minutes of previous years, particularly a meeting of February, 1954, and 1955, for this corporation? A. Yes. [65]

Q. I hand you this document. Do you recognize it? A. Yes, I do.

Q. What is that?

A. That is the minutes of the meeting of the Admiralty Alaska Gold Mining Company that was held in Juneau on February 1, 1954.

Mr. McLean: I would like to have the clerk mark this for identification. It is requested, your Honor, that, should counsel for the plaintiff wish these introduced in evidence, we would want to reserve the right to withdraw them at the close of the trial since they are the corporation's minutes.

The Court: Very well; you may have them.

Mr. Boochever: I would have no objection as long as a copy of them is made available to the Court. In fact, I have a copying machine in my office and I will be glad to copy them for counsel if he wishes.

Mr. McLean: Does plaintiff have any objection to the admissibility of these?

Mr. Boochever: I want to see what they are.

(Testimony of William S. Dapceovich.)

The Clerk: They will be Defendants' Exhibit B for Identification.

Mr. Boochever: I have no objection to the minutes of the meeting. I don't think the minutes of the stockholders meeting have any relevancy. I have no objection to them being [66] submitted, but I think we could stipulate to the Court that they have no bearing on the case and prevent the Court from having to look at them, if counsel wishes. I have no objection to it, but I just don't think there is anything material.

Mr. McLean: They were all together, your Honor, so we kept them all together.

Mr. Boochever: We could easily separate them.

Mr. McLean: May it please the Court, I would like to read a portion of this exhibit so that the Court can be apprised of it.

The Court: There is no objection to the exhibit, as I understand it?

Mr. Boochever: No. I have no objection to the minutes being entered.

The Court: It may be received.

The Clerk: It will be admitted then and marked Defendants' Exhibit B.

(Testimony of William S. Dapceovich.)

DEFENDANTS' EXHIBIT B

Minutes of Meeting of Admiralty Alaska Gold Mining Company

held at Juneau, Alaska, at 2 p.m., Feb. 1, 1954, and adjourned until 8 p.m., Feb. 1, 1954. Time 8 p.m., Feb. 1, 1954.

Meeting called to order at 8 p.m., Feb. 1, 1954, in the office of C. J. Ehrendreich in the Shattuck Building, Juneau, Alaska.

Present: Henry Roden, W. S. Pekovich, R. E. Coughlin, Mrs. Henry Roden, C. J. Ehrendreich, Mr. Burke Riley and Mrs. Karl Theile.

Stock represented as follows: In person 25,500 shares, by proxy 3,864,782 shares which constitute a quorum.

The Secretary, Mr. Ehrendreich, read Notice of Annual Meeting of Stockholders, to be held Feb. 1, 1954, at 2 p.m. at Juneau, Alaska, for the purpose of electing Directors. The call was dated Dec. 21, 1953, and signed by C. J. Ehrendreich, as Secretary.

Mr. Ehrendreich read in full his Affidavit of mailing Notice, date of mailing and contents were as by law required.

The Secretary read minutes of meeting held 2 p.m., Feb. 4, 1952, adjourned until 7 p.m. same date, which minutes had previously been approved. This

(Testimony of William S. Dapceovich.)

meeting was adjourned to reconvene Feb. 29, 1952, and then further adjourned to meet March 18, 1952. No quorum was present on March 18, 1952, and meeting was further adjourned until March 25, 1952.

Minutes of meeting of March 25, 1952, were read. Mr. Pekovich objected to the wording of the Resolution concerning 600,000 shares of stock which he had received, the Resolution stating that these shares of stock were in full for expenses incurred and Pekovich's stock used by him in furtherance of the company's benefit up to March 22, 1952. Mr. Pekovich stated that the Resolution should state that the 600,000 shares which he received were in part refund only for his stock which he had sold and otherwise disposed of for the interests of Admiralty Alaska Gold Mining Company during the years in which he was in charge of the company.

The Secretary stated that he had written out a Release which he had asked Mr. Pekovich to sign and that he had refused to sign such Release.

Mr. Pekovich stated that he was willing to sign a Release if it were worded properly and suggested the following:

“For and in Consideration of 500,000 shares of stock of Admiralty Alaska Gold Mining Company returned to me and 100,000 shares of said stock I have committed to Norman C. Stinnes, I hereby release Admiralty Alaska Gold Mining Company from any further payment to me or delivery of stock, this being understood to be a refund of part of my personal stock sold and otherwise disposed of for the interest of Admiralty Alaska Gold Min-

(Testimony of William S. Dapceovich.)

ing Company during the years I have been in charge of it, and not as any money consideration."

The Release was unanimously approved by the stockholders represented at this meeting.

Report of the President was read. Report stated that matters concerning the company were progressing nicely and that a full Report would be made in 60 days.

Mr. Ehrendreich moved, Mr. Coughlin seconded, that the Report of the President be approved. The Report was approved unanimously.

Mr. Roden stated that he thought this meeting should be adjourned until more is known of the reports of the Geological Survey and Bureau of Mines.

Mr. Roden suggested that if Mr. Pekovich were going to New York on company business that a new Power of Attorney be prepared for him.

Mr. Roden again stated that he wished to adjourn this meeting.

The Secretary-Treasurer, Mr. Ehrendreich, stated that he had a busy Tax period coming up and that he wished to resign as Secretary-Treasurer, stating that the \$75.00 per month he received was not ample compensation for the amount of work it was necessary for him to perform for the Company. There was no objection to this and Mr. Pekovich suggested that Mr. R. E. Coughlin take over the duties of Secretary-Treasurer, to which there was no objection and Mr. Coughlin expressed his willingness to perform such duties to the best of his ability. Mr.

(Testimony of William S. Dapceovich.)

Ehrendreich stated that he would render Mr. Coughlin as much help as possible and turn over to him the files and records of the company.

Mr. Roden moved that the meeting adjourn until Feb. 15, 1954, unless sooner reconvened by the President. Mr. Coughlin seconded the motion and it carried unanimously.

ADMIRALTY ALASKA GOLD
MINING COMPANY.

Release

For and in Consideration of 500,000 shares of stock of Admiralty Alaska Gold Mining Company returned to me and 100,000 shares of said stock I have committed to Norman C. Stinnes, I Hereby Release Admiralty Alaska Gold Mining Company from any further payment to me or delivery of stock, this being understood to be a refund of part of my personal stock sold and otherwise disposed of for the interest of Admiralty Alaska Gold Mining Company during the years I have been in charge of it, and not as any money consideration.

Attest:

/s/ ROBERT E. COUGHLIN,
Secretary-Treasurer.

/s/ W. S. PEKOVICH.

Dated Juneau, Alaska, March 16, 1954.

Received in evidence April 2, 1957.

(Testimony of William S. Dapceovich.)

Mr. McLean: The portion that pertains to this particular matter, your Honor, reads as follows: "The Secretary-Treasurer, Mr. Ehrendreich, stated that he had a busy Tax period coming up and that he wished to resign as Secretary-Treasurer," and then, your Honor, there is a long blank space without punctuation, and it continues to read: "stating that the \$75.00 per month he received was not ample compensation for the amount of work it was necessary for him [67] to perform for the Company. There was no objection to this and Mr. Pekovich suggested that Mr. R. E. Coughlin take over the duties of Secretary-Treasurer, to which there was no objection and Mr. Coughlin expressed his willingness to perform such duties to the best of his ability. Mr. Ehrendreich stated that he would render Mr. Coughlin as much help as possible and turn over to him the files and records of the company."

The portion I wish to call the Court's attention to amounts to two-thirds or three-fourths of the line that is blank, inferring that apparently something is missing, but we don't know what it is.

Mr. Boochever: Well, I think the Court is well able to—counsel is arguing to the Court at this point, it seems to me, when he says "inferring"—

Mr. McLean: I only wish to point that out as being part of the minutes.

The Court: The Court will make note of the blank.

(Testimony of William S. Dapceovich.)

Q. (By Mr. McLean): I hand you this document, Mr. Dapceovich; do you recognize it?

A. Yes, I do.

Q. Would you tell the Court what that is, if you can identify it?

A. It is the minutes of the annual meeting of the stockholders of Admiralty Alaska Gold Mining Company of [68] February 7, 1955.

Q. 1955.

Mr. McLean: The defendant desires that this document be introduced as its next exhibit. Counsel for the plaintiff has seen it. Do you have any objection, or did you want to look at it?

Mr. Boochever: I will just take a moment to look at it. No objection.

The Court: It may be received.

Q. (By Mr. McLean): Mr. Dapceovich, I wish to call your attention to a particular paragraph which reads as follows: "The following stockholders were present in person," and with a column listing the names and another column listing the number of shares. At the bottom of the list of names there is one, Mr. Robert E. Coughlin, and in this report—number of shares, five thousand. Now, from your knowledge of the company's books, Mr. Dapceovich, how many shares did Mr. Coughlin actually have in 1954—this was a year before these minutes?

A. To the best of my knowledge he had one thousand shares.

Q. In 1955 how many shares did he have according to the records of the company?

(Testimony of William S. Dapcevich.)

A. One thousand shares.

Q. To your knowledge, did he ever have any more than one thousand shares? [69]

A. Not to my knowledge; no.

Q. Would you say, Mr. Dapcevich, that five thousand was correct or wrong?

A. I would say it was incorrect.

Q. I believe counsel for the plaintiff also examined some copies of vouchers that went with the checks that we were going to introduce this morning. Do you have the rest of the vouchers here with you, Mr. Dapcevich?

A. Yes, I do.

Q. Would you step down and get them, please?

A. (Stepped down.)

The Clerk: For the record I will say that the minutes of the stockholders meeting, February 5, 1955, are marked Defendants' Exhibit C.

DEFENDANTS' EXHIBIT C

Admiralty Alaska Gold Mining Co.

Minutes of Annual Meeting of Stockholders held at Juneau, Alaska, February seventh, 1955.

The annual meeting of the stockholders of Admiralty Alaska Gold Mining Company was held at the office of the Company in the City of Juneau, Alaska, on the seventh day of February, 1955, at the hour of two o'clock in the afternoon.

(Testimony of William S. Dapcevich.)

Defendants' Exhibit C—(Continued)

After calling the meeting to order the President suggested that an adjournment be taken, due to the press of other business. Upon motion duly made and unanimously adopted the meeting adjourned to seven o'clock p.m. the seventh day of February, 1955.

At seven o'clock p.m. of February seventh, 1955, pursuant to adjournment the meeting was called to order by President Henry Roden. Robert E. Coughlin acting as Secretary.

The following stockholders were present in person :

| Name | No. of Shares | |
|--------------------------|---------------|-----------|
| Henry Roden | 21,000 | |
| Howard D. Stabler | 1,100 | |
| Burke Riley | 2,500 | |
| J. Gerald Williams | 1,000 | |
| W. S. Pekovich | 1,131,143 | |
| Robert E. Coughlin | 5,000 | 1,161,743 |

There being a large number of stockholders who have appointed proxies it is deemed inadvisable to insert their names and on motion duly made and unanimously adopted; it was resolved that the Secretary, having duly compiled said proxies, dispense with the inserting the names of each one of them in lieu thereof insert the names of the proxies and the number of shares represented by each of them. Which is done accordingly.

(Testimony of William S. Dapceovich.)

Defendants' Exhibit C—(Continued)

| Name | No. of Shares |
|--------------------------|---------------|
| Henry Roden | 33,420 |
| Robert E. Coughlin | 65,828 |
| J. Gerald Williams | 4,250 |
| Directors | 107,472 |
| W. S. Pekovich | 1,202,030 |
| | 1,413,000 |
| <hr/> | |
| Total | 2,574,743 |

It appears that a majority of all stock outstanding is duly represented and in attendance.

The proxies were ordered filed with the minutes of this meeting.

The Secretary presented and read a copy of the Notice of this Meeting together with proof of mailing of the same at least thirty days prior to the meeting to each registered stockholder at his known address as same appears on the books of the corporation.

The minutes of the previous annual meeting of stockholders, held on the First day of February, 1954, were read and on motion duly made were approved, ratified and confirmed.

When the President called for the submission of reports Mr. Pekovich, General Manager, explained that work under the D.M.E.A. is still going on. That the contract under which this is being done will soon come to an end and that upon its completion a full report of the progress made under it will be submitted by him.

(Testimony of William S. Dapcevich.)

Defendants' Exhibit C—(Continued)

Thereupon discussion was had upon the proposed sale of 600,000 of the capital stock of the Company. It appeared that Mr. Pekovich has heretofore made application to the Securities and Exchange Commission in connection with the contemplated sale, but to date no word has been received from the Commission in response to said correspondence.

The President raised the question about fixing the price at which said stock is to be sold, expressing the opinion that the par value thereof (being one dollar per share) should be set as the purchase price in case any of it is offered for sale and sold. Mr. Howard D. Stabler was then requested for a legal opinion on the point raised, to be rendered to the Board of Directors.

Upon motion duly made and unanimously seconded and adopted, the following named persons were duly elected Directors of this Company to serve for the ensuing year and until their successors are elected and qualified. To wit:

Henry Roden, Norman C. Stinnes, Arthur F. Erickson, J. Gerald Williams and Robert E. Coughlin.

Mr. W. S. Pekovich announced that he had advanced sufficient funds to redeem the Six Per Cent Income Notes heretofore held by the Company and in connection therewith had expended the sum of \$. which he claimed was due him and

(Testimony of William S. Dapceovich.)

Defendants' Exhibit C—(Continued)

should be repaid to him. After some discussion, motion was made by Howard D. Stabler, seconded by J. Gerald Williams that this Company acknowledge its indebtedness in the indicated amount and that proper record thereof be made upon delivery to the Secretary of this Company, all notes paid and redeemed as aforesaid. The motion was carried unanimously.

No further business to come before the meeting it was adjourned, to reconvene at the call of the President.

/s/ HENRY RODEN,
President.

Attest.

.....,
Secretary.

Received in evidence April 2, 1957.

A. (Resumed the witness stand.)

Q. Would you produce Vouchers 682, 693, 757 and 770? A. (Produced documents.)

Mr. McLean: I would like to have them marked for identification and, subject to objection, I would like to introduce them.

Mr. Boochever: No objection, save my previous objection as to the relevancy of those checks and vouchers.

(Testimony of William S. Dapceovich.)

Q. (By Mr. McLean): There are four payments, Mr. Dapceovich—one in the amount of two hundred dollars; one hundred dollars; another one hundred dollars; and three hundred [70] and fifty. Were any of these drafts or vouchers in payment of salary? A. No; they were not.

Q. Are these true copies as were originally issued by the company?

A. They must be. They are prenumbered. And, for example, this one here still contains a carbon signature of Mr. Coughlin, and so does this one.

Q. Were the original of these all signed by Mr. Coughlin? A. Yes, they were.

Mr. McLean: Four copies together as one exhibit.

The Clerk: That will be Exhibit D.

Q. (By Mr. McLean): Mr. Dapceovich, since you took over as secretary-treasurer from Mr. Coughlin, would you tell the Court what condition you found the books of the company in?

Mr. Boochever: I object to that as irrelevant, immaterial and incompetent.

Mr. McLean: I think it is entirely in order, your Honor, since the plaintiff's case rests entirely upon the duties of the secretary-treasurer, and it has been presumed on the part of the plaintiff that he actually performed these duties. No contest is being made, but there would be a question, however, as to whether he did actually follow through and perform the services. [71]

Mr. Boochever: Well, your Honor, that is ad-

(Testimony of William S. Dapceovich.)

mitted in Paragraph 4 of the answer and affirmative defense. The defendants stated they "Admit that said Robert E. Coughlin performed services as alleged," and we of course didn't come here prepared to argue about that since they admit it, and they can't now bring in evidence in opposition to their pleadings on that.

The Court: I think that is correct, Mr. McLean. Objection will be sustained.

Q. (By Mr. McLean): What salary, Mr. Dapceovich, did you receive when you took over as secretary-treasurer?

Mr. Boochever: I object to that as being immaterial, irrelevant and incompetent.

The Court: Objection is overruled.

A. I received seventy-five dollars a month for a period of, I believe, eight or nine months, and after that I received an increase in salary due to the amount of work that I had to perform.

Q. (By Mr. McLean): Did you do any work on matters connected with the D.M.E.A.?

A. Yes, I did.

Q. Would you tell the Court approximately how much of your time was spent doing D.M.E.A. work?

A. Well, I would have to go back again to the time of Mr. Coughlin's employment because I had to go back and [72] complete his work, so I, as a result, had to do quite a bit of the D.M.E.A. work as far as the books were concerned.

Q. When was the D.M.E.A. work completed

(Testimony of William S. Dapceovich.)

as far as the actual Government advances were concerned?

A. To the best of my knowledge it was the first part of 1955. I should say—yes; 1955.

Q. Now, as secretary-treasurer of the company, Mr. Dapceovich, did you have occasion to look back in the books to determine when the D.M.E.A. work first started?

A. Yes, I did on occasion. In preparing financial statements it was necessary for me to go back to Mr. Ehrendreich's work, because that was the last time that a complete financial statement had been prepared.

Q. Did you notice whether any D.M.E.A. work was done by Mr. Ehrendreich? A. Yes.

Q. Could you tell the Court approximately how much, from your work and observation of the books?

A. I couldn't tell that without further study into the records, as to the exact amount.

Q. Now, Mr. Dapceovich, was this a full-time job for you, or a part-time, or just what was the understanding when you took over this work?

A. Part-time. [73]

Q. What is your regular occupation?

A. I am a voucher-examining supervisor with the Alaska Native Service.

Q. Is that accounting work that you do there?

A. Yes.

Q. In other words, you are by profession an accountant, is that it, or work on accounting?

(Testimony of William S. Dapceovich.)

A. Well, I have had—all my experience has been in the line of accounting. I wouldn't say—well, of course, I am not a certified public accountant, but all my training has been in bookkeeping and accounting and voucher-examining work.

Q. How many years have you been engaged in this work? A. Eleven years.

Q. Along with the salary of seventy-five dollars a month that you received was any other facility or office or something of that nature furnished?

A. Yes. The Admiralty Alaska Gold Mining Company furnished the office space and all the facilities. I worked right in the office.

Mr. McLean: No further direct.

Cross-Examination

By Mr. Boochever:

Q. What is the salary you got due to that increased work, [74] Mr. Dapceovich?

A. One hundred and twenty-five dollars a month.

Q. And, now, who hired you?

A. The board of directors.

Q. Did the whole board, or who consulted you and asked you to take the job?

A. Mr. Pekovich.

Q. Who set your salary?

A. The salary was to my knowledge prescribed by—it was set up as a precedent, I believe. All the previous secretary-treasurers have received that like salary.

(Testimony of William S. Dapeevich.)

Q. And who authorized your increase from seventy-five to one hundred and twenty-five?

A. That was authorized by, I believe that was authorized by, Mr. Pekovich and Mr. Roden, I believe.

Q. There was no board of directors meeting about that, was there? A. No; there wasn't.

Q. Now, who gives you your instructions in regard to your work?

A. My instructions—I am, as far as the book-keeping is concerned, I am on my own, but the instructions would come from Mr. Pekovich and the board of directors.

Q. Well, actually, the board of directors doesn't ever meet and give you instructions, do they? Have they ever done [75] that? A. No; they do not.

Q. So, Mr. Pekovich gives you the instructions, doesn't he?

A. Well, I don't know the exact nature of your question. I don't understand it. Instructions on what?

Q. Upon what work you should do, and so forth, and what reports you should fill, and turns matters over to you and says, "Will you take care of this, please, Bill," and that kind of stuff?

A. Well, yes.

Q. It is Mr. Pekovich who does that; isn't that correct?

A. Well, that is right; except that I want to correct it to this extent. The bookkeeping and so forth,

(Testimony of William S. Dapceovich.)

of course, all the phase of that work, wouldn't come under his supervision or direction.

Q. Who else supervises it and directs it?

A. That more or less speaks for itself. You know what you are supposed to do.

Q. In other words, you just do it yourself; is that right? A. That is right.

Q. And, as far as anyone giving you instructions, it is Mr. Pekovich?

A. Yes; as far as the operation of the office.

Q. He is the principal person concerned with this corporation, isn't he? [76]

A. That is correct.

Q. Now, with reference to this entry in the 1955 minutes of the meeting where it shows "Robert E. Coughlin—5,000 shares," you stated that actually on the stock books he only shows one thousand shares; is that right; that is all that was ever issued to him?

A. That is correct to the best of my knowledge.

Q. Then, would the only other explanation for the additional four thousand be some kind of agreement to give him four thousand shares more?

A. Well, I don't know about that.

Mr. Boochever: No further questions.

(Testimony of William S. Dapceovich.)

Redirect Examination

By Mr. McLean:

Q. Mr. Dapceovich, Mr. Boochever asked you about an increase in your salary in recent months. Would you tell the Court whether or not there has been any corresponding increase in the size and structure of the company's operations and your duties? A. Yes; I would say definitely yes.

Q. Is that something fairly recent or since you have taken over?

A. Since I took over and that, in addition to the fact that, there was so much work involved in bringing the accounts [77] up to date. What was supposed to originally be just a part-time job, a couple of nights or evenings, worked out that a lot more time had to be spent on the job, practically every night of the week plus the week ends.

Q. Do you have any idea, Mr. Dapceovich, how much money you were handling in the conduct of your work as secretary-treasurer here in recent months?

A. I couldn't recollect that exact figure.

Mr. McLean: No further redirect.

(Testimony of William S. Dapceovich.)

Recross-Examination

By Mr. Boochever:

Q. Mr. Dapceovich, when did you say the D.M.E.A. work terminated?

A. I believe that was the first part of 1955, to the best of my recollection.

Q. Well, there was certainly more work when they had the D.M.E.A. than when they didn't have it, wasn't there?

A. Well, accounting-wise, I don't know that there would be.

Q. But report-wise and letter-wise and so forth, there certainly would be, wouldn't there?

A. Well, yes.

Mr. Boochever: That is all. [78]

Redirect Examination

By Mr. McLean:

Q. And you did a considerable amount of that D.M.E.A. work even after 1955 when you took over, didn't you?

A. Not directly, except going back, and to prepare financial statements I had to retrace all the D.M.E.A. work and payments.

Mr. McLean: That is all.

Mr. Boochever: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. McLean: Your Honor, at this time we wish to introduce a certified copy of the Inventory and Appraisement which was filed in the Estate of Robert E. Coughlin, the certificate of Henry C. Leege, United States Commissioner. It would be a matter of judicial notice. Unless counsel has some objection, I would like to have the document entered and made a matter of record.

Mr. Boochever: I don't see any relevancy to it, your Honor, and I object to it for that reason, that it is immaterial, irrelevant and incompetent.

The Court: What is the purpose?

Mr. McLean: To point out, your Honor, that the Estate of Robert E. Coughlin listed an interest in Admiralty Alaska Gold Mining Company, one thousand shares, value four [79] hundred dollars.

Mr. Boochever: Well, your Honor, that is not in issue. It is admitted that all we had was one thousand shares, and we had this agreement which Mr. Pekovich refused to admit and refused to agree to, and so that is the only thing in the Inventory and Appraisement, but it has no bearing on the case.

Mr. McLean: I believe it does, your Honor, since counsel for the plaintiff is relying heavily upon the minutes of the company, wherein the said Robert E. Coughlin listed, when he wrote the minutes, five thousand shares of stock for himself. In other words, the credibility, so to speak, and veracity of Robert E. Coughlin is at stake here now, and it is necessary to know, at least as a matter of record, how many shares he did actually have.

Mr. Boochever. Well, your Honor, I don't see

how what the Inventory and Appraisement, made after his death, can affect the credit and veracity of Robert E. Coughlin. If it was an admission of his, it might have some possible bearing. But I have no objection, actually, to its going in. It is a trial before the Court, and I am sure the Court can give it what weight it is entitled to, but I think I should certainly point out that it has no bearing whatsoever when all it shows is the actual shares that were in the possession of the administrator, and that is all it shows.

The Court: In view of the statement in the minutes [80] that one year he had a thousand shares and the next year five thousand shares, although it has been testified to that was in error, I think that this would be a verification of the fact that that was in error, and I will receive it for what purpose, whatever worth it may have in the matter. It may be received.

DEFENDANTS' EXHIBIT E

United States of America,
Territory of Alaska, Division No. 1—ss.

I the undersigned, United States Commissioner for the Juneau Precinct, Territory of Alaska, Division No. One, do hereby Certify that the hereto attached is a full, true and correct copy of the original Inventory and Appraisement in the Matter of the Last Will and Testament and Estate of Robert E. Coughlin, Deceased, being Probate Case No. 1988, on file and of record in my office.

Defendants' Exhibit E—(Continued)

In Testimony Whereof, I have hereto subscribed my name and affixed my official seal at Juneau, Alaska, this 20 day of February, 1957.

[Seal] /s/ H. C. LEEGE,
 U. S. Commissioner,
 Juneau, Precinct.

Defts' Exhibit No. E.

Received in Evidence April 2, 1957.

(Copy)

In the Probate Court for the Territory of Alaska,
First Division, Juneau Precinct

Probate No. 1988

In the Matter of:

The Last Will and Testament and Estate of Robert
E. Coughlin, Deceased.

INVENTORY AND APPRAISEMENT

Personal Property:

| | |
|---|------------|
| Cash in B. M. Behrends Bank, Juneau | \$2,171.50 |
| Partnership interest in vessel Forester | 3,500.00 |
| Alaska Mutual Benefit Association insur- | |
| ance policy | 1,000.00 |
| Interest in Snettisham mining claims, | |
| Magnetite Nos. 1 to 18, on Snettisham | |
| Peninsula | 1,000.00 |

Defendants' Exhibit E—(Continued)

| | |
|---|----------|
| Admiralty Alaska Gold Mining Co., 1,000 shares | 400.00 |
| Alaska Empire Gold Mining Co., 5,000 shares | 1.00 |
| Jack White Mining Co., 100 shares | 30.00 |
| Admiralty Island Coal Co., 55 shares | 1.00 |
| Livingood Cinnobar Corp., 20,000 shares .. | 1.00 |
| International Highway Gold Mining & Exploration Co., 200 shares | No value |
| Lucky Chance Gold Mining Co., 250 shares | No value |
| United Western Mines, Inc., 1,000 shares.. | No value |
| Interest in estate of Laura Gamble and James Arthur Gamble | 1,000.00 |

Total Personal property\$9,104.50

Real Property:

That certain property known as 119 Seventh Street, Juneau, Alaska, and more particularly described as follows, to wit:

Commencing at Corner No. 1, whence the southwest corner of Government Lot, Block 19, being the corner made at the intersection of Main and Fifth Street bears S. 57 deg. 44 min. W. 55.3 feet and S. 41 deg. 23 min. E. 544.7 feet. Courses determined by taking the direction from the corner of the Government Lot in Block 19, made at the intersection of Main and Fourth Street to the said southwest corner of the Government Lot as N.

Defendants' Exhibit E—(Continued)

41 deg. 17 min. W. Starting at said Corner No. 1, thence N. 71 deg. 22 min. E. 41.4 feet to Corner No. 2, and iron pipe driven in the ground at the corner of the present fence; thence S. 25 deg. 52 min. E. 56.0 feet to Corner No. 4, an iron bar driven in the ground at the corner of the present fence; thence S. 59 deg. 40 min. W. 57.9 feet to Corner No. 5, an iron pipe driven in the ground at the corner of the present fence; thence N. 37 deg. 42 min. W. 86.0 feet to Corner No. 1, an iron pipe driven in the ground at the corner of the fence, which tract contains 4,871 sq. ft., more or less; together with the tenements and appurtenances thereunto belonging; except a strip 8.0 feet wide running along the boundary formed by a line drawn from Corner No. 4 to Corner No. 5, and a perpetual easement and right-of-way granted over a strip of ground 8 ft. wide along the boundary formed by running a line from Corner No. 3 to No. 4, and except a perpetual easement and right-of-way over and upon a triangular piece of ground at the corner of the intersection of said right-of-way hereinabove described and the 8 ft. strip hereinbefore conveyed. The base and altitude of said triangular strip being 8 feet on each line from said corner \$12,000.00

Defendants' Exhibit E—(Continued)

That certain property formerly located in the Township Thirty-two South of now located in the Haines Recording Precinct, particularly described as follows, to wit:

| | | |
|--|--|-------------|
| Lots One and Two of Section Eighteen in the Township Thirty-two South of Range Sixty East, and the Lots Two and Three, the North half of the Southeast quarter, and the southwest quarter of the northeast quarter of Section Thirteen in Township Thirty-two South of Range Fifty-nine East of the Copper River Meridian, Alaska, containing 240.52 acres, according to the official plat of the survey of said land on file in the General Land Office, which said land was patented to Joseph Curry by the United States of America on June 18, 1925, Patent No. 961879; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining | | \$250.00 |
| Total real property | | \$12,250.00 |
| Grand Total | | \$21,354.50 |

Defendants' Exhibit E—(Continued)

We, the undersigned, having been appointed appraisers of the above-entitled estate, have examined and appraised all of the property of said estate which has been exhibited to us and of which we have any knowledge, and we have appraised the various items as above set forth at their true and fair market value.

W. H. BARRINGTON, JR.,
HENRY RODEN,
E. L. HUNTER.

United States of America,
Territory of Alaska—ss.

I, Minnie Coughlin, executrix of the above-entitled estate, being first duly sworn according to law, depose and say:

That the foregoing is a fair and true inventory and appraisement of all of the assets of the estate of Robert E. Coughlin, deceased, which have come into my hands and of which I have any knowledge.

MINNIE COUGHLIN.

Subscribed and sworn to before me this 2nd day of August, 1956.

[Seal] R. BOOCHEVER,
Notary Public for Alaska.

My Commission expires: Nov. 10, 1959.

Received in evidence April 2, 1957.

Mr. McLean: Your Honor, at this time I would like to prevail upon the Court for another short recess. One of my witnesses, the next witness I have in mind, just returned to town, and I haven't had a chance to consult with him on some of the details of the case and I would very much like to speak with him for five minutes before producing him.

The Court: I think any attorney is entitled to talk with a witness and not put him on blindly. We will take a ten-minute recess.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; whereupon the trial proceeded as follows:)

Mr. McLean: Your Honor, at this time the defense will rest. [81]

Plaintiff's Rebuttal

C. J. EHRENDREICH

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, please?

A. C. J. Ehrendreich.

Q. And what is your occupation?

A. At the present time, Auditor for the Ter-

(Testimony of C. J. Ehrendreich.)

ritory of Alaska. Prior to this, certified public accountant.

Q. And have you ever been employed by or retained by Admiralty Alaska Gold Mining Company? A. Yes.

Q. During what period of time?

A. From about 1953 through about February or January of 1955.

Q. And during that period of time what was your occupation with them?

A. Secretary-treasurer.

Q. And did you handle the books for the corporation? A. The books of account; yes.

Q. And what—did you receive a salary?

A. Yes.

Q. What was the salary?

A. Seventy-five dollars.

Q. Why did you terminate your [82] employment?

A. For several reasons; first, disagreement with Mr. Pekovich; next of all, the seventy-five dollars I was receiving didn't begin to even cover the clerical time, let alone anything for myself for acting as secretary-treasurer.

Q. Was there quite a volume of work that had to be performed?

A. A considerable volume.

Q. Who was the one who employed you on behalf of Admiralty Alaska?

A. Oh, I would say it was a combination of Mr. Pekovich and Mr. Roden.

(Testimony of C. J. Ehrendreich.)

Q. And whom did you work with in conjunction with your work there?

A. Primarily with Mr. Pekovich.

Q. Now, did you know Robert Coughlin, who is now deceased and whose executrix is bringing this case?

A. Very well.

Q. Did you know that he succeeded you as secretary-treasurer in taking care of the accounts of the corporation?

A. Yes.

Q. Did you ever have any conversations with Mr. Coughlin pertaining to his agreement to take over that work?

A. Very many conferences during the early part of '55.

Q. And what did Mr. Coughlin tell you in regard to that, as to what his agreement was? [83]

Mr. McLean: Objection, your Honor; calling for hearsay evidence.

Mr. Boochever: Well, your Honor, that is covered specifically in our statute, on the deadman's statute. It is Section 58-6-1, A.C.L.A. 1949, in which it states: "When a party to a civil action or suit by or against"—I will wait until your Honor gets it there. "When a party to a civil action"—

The Court: Did you say -6-?

Mr. Boochever: -6-1, your Honor.

The Court: 58-6-1?

Mr. Boochever: That is right, sir.

The Court: O. K.

Mr. Boochever: Oh, wait a second, your Honor. I have the wrong citation. I am sorry. Yes; that is

(Testimony of C. J. Ehrendreich.)

right. It is the right citation, only I am starting—starting at the middle of the paragraph, the sentence at the bottom: “When a party to a civil action or suit by or against an executor or administrator appears as a witness in his own behalf, statements of the deceased whether oral or in writing concerning the same subject may also be shown.”

The Court: I think that settles it.

Mr. McLean: I didn’t think this was within the scope of that definition, your Honor. I looked it over. I don’t have it before me but—— [84]

The Court: It says, just as he read it, the whole statute says—“Matters affecting credibility” is the title, and it says “Statements of deceased person.” Let’s read it all and see. Maybe you are right.

“Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded as witnesses; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case, except the latter, the credibility of the witness may be drawn in question, according to the rules of the common law. When a party to a civil action or suit by or against an executor,” and this is by an executor, “or administrator appears as a witness in his own behalf,” and Mr. Pekovich is a party and has appeared as a witness in his own behalf, “statements of the deceased whether oral or in writing concerning the same subject may also be shown.”

(Testimony of C. J. Ehrendreich.)

So, I believe that——

Mr. McLean: Isn't that, your Honor, for the executor or executrix, as the case may be?

The Court: It says for or against. "When a party to a civil action or suit"——

Mr. McLean: The witnesses themselves—in this case we have an altogether disinterested person who is not a party to the action at all. [85]

The Court: But it says: "When a party to a civil action or suit by or against an executor or administrator appears as a witness in his own behalf, statements of the deceased whether oral or in writing concerning the same subject may also be shown." And I imagine the purpose of it is to show by statements of the deceased that the facts were different than were testified to by the party in his own behalf.

Mr. McLean: Well, your Honor, before we finish with it, I only wish to point out, when there are statutes such as this, that the common law, generally discussed in American Jurisprudence and a number of other encyclopedias, interpret that to be one of the exceptions to the hearsay rule but confine it to statements which are against the decedent's interest, or, in this case, the plaintiff's interest.

Just a minute and I will read you what American Jurisprudence has to say on the subject. I will quote from American Jurisprudence, Volume 20, Section 608 of Evidence, concerning "Deceased Persons' Declarations." 608 begins: "Generally—In the absence of statute, the death of a declarant is not in

(Testimony of C. J. Ehrendreich.)

itself a ground for invoking an exception to the hearsay rule which renders unsworn statements inadmissible in evidence." I will go over this rather hastily until I come to the meat of it, your Honor. "Under certain circumstances, however, statements made by a person since deceased are admissible under an exception to such rule, based on the ground of [86] necessity. It has been asserted that while declarations of deceased persons are always to be received with caution, the conventional objection that evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion concerns the weight, rather than the competency, of such proof."

Now, I will skip over a couple of sentences to save time, your Honor, because the important one is the last paragraph here.

"If a declarant is dead, the general rule is that statements made by him against his pecuniary or proprietary interest are admissible even as between third parties. Within limitations, the declarations of persons since deceased are competent upon questions of boundaries. Moreover, statements of a deceased person have been held admissible upon the question of his citizenship. As hertofore stated, the declarations of deceased persons are received under certain limitations and restrictions in proof of matters of family history, relationship, and pedigree. Again, the declarations of a testator or an insured are admissible for certain purposes following his decease. There is a conflict of authority in reference to the

(Testimony of C. J. Ehrendreich.)

admissibility of declarations of deceased attesting witnesses concerning the mental capacity," and the subject continues on to one in which statutes are applicable, which runs right to the particular statute that we have on our [87] books and the interpretation of it.

"A question concerning the actions or proceedings in which a statute providing for the admission in evidence of the statements of a person since deceased depends to a great extent for its solution upon the terms of the statute, which, as previously stated, is usually accorded a liberal construction. There is authority for the proposition that the particular form in which a proceeding is brought is immaterial in this connection. Such a statute has been held applicable to a disbarment proceeding and a proceeding under a Workmen's Compensation Act."

And I want to read—the conditions under which this kind of evidence would be admissible is based upon the statute with this interpretation: "Good Faith of Declarant—Good faith being one of the conditions under which the declarations of a deceased person are admissible under a statute, a declaration is not competent unless found by the court to have been made in good faith. A court is justified in finding that a declaration was made in good faith where it appears to have been made in writing in response to a letter enclosing a questionnaire," and so forth.

And I contend, your Honor, that, any interpreta-

(Testimony of C. J. Ehrendreich.)

tion given to this particular statute, it should be based upon the testimony to the parties, or in this case the executrix, and the other party, the individual who wrote the letter and had [88] the dealing with Mr. Coughlin, not upon third parties or strangers who may want to come in and give their interpretation based upon hearsay of what may have transpired.

While I haven't come prepared to dispute the statute or try to write in an interpretation of it, I think that it does exclude such hearsay testimony as to what this decedent told someone else, because we could bring in witnesses for the next three days.

The Court: I realize that. I realize what you are trying to bring up in this argument, and the Court is very cognizant of the danger of such a rule of law. A man could make a very self-serving declaration or statement during his lifetime and then die, and that could be testified to and, if accepted as a positive fact, might result in great injustice being done. However, the statute permits that kind of testimony. The weight of that is certainly for the Court, or the jury, as the case may be, and, in view of your statute, I don't see any cases there which have any bearing on this particular matter, and I will overrule your objection and accept the testimony.

Q. (By Mr. Boochever): Mr. Ehrendreich, I believe the question was whether you had any conversations with Mr. Coughlin pertaining to this con-

(Testimony of C. J. Ehrendreich.)

tract of employment. Would you state what Mr. Coughlin told you in that regard?

A. It wasn't just one single conversation. It was a series [89] of conversations over a period of time while Mr. Coughlin was getting familiar with the books. I recall one particular instance where I was helping prepare the payroll tax return and we were discussing Form 941 and so on.

The Court: Do you remember the time and the date and the place?

A. This was right around the end of January, because the report was due the 31st of January.

The Court: What year?

A. 1955.

The Court: 1955.

Q. (By Mr. Boochever): And what transpired on that; what was said by Mr. Coughlin on that occasion?

The Court: Let's see—who was present?

Q. (By Mr. Boochever): Who was present?

A. I was there. Mrs. Ehrendreich was right outside of my office door, and Mr. Coughlin was in at my desk, and her desk was right outside of my office door, and so the three of us were there, or in effect there, because she could hear what was going on.

Q. And what was said at that time?

A. He had been aware—I might go back to bring out what he had said—he had been aware for some time of the volume of work that I was doing, and the time he brought these [90] payroll reports in

(Testimony of C. J. Ehrendreich.)

we discussed pretty generally the work, and he said, "I can see now why you kept saying that seventy-five dollars wasn't enough," and I said, "Well, Bob, my understanding is that you settled for the same thing." He said, "Well, I have got some stock." He didn't mention the amount, but he said, "Well, I have got some stock."

Q. In other words, he told you that he had some stock over and above the seventy-five dollars——

The Court: Now, wait a minute.

Mr. McLean: I object to the leading question and——

The Court: That is highly improper, Mr. Boochever.

Mr. Boochever: I was trying to rephrase, your Honor, what he said. I beg your pardon.

The Court: He said he didn't say how much stock he had or anything. He just said, "I have got some stock," and I think——

Mr. Boochever: Well, I wasn't attempting to change that at all, your Honor. I was merely rephrasing what he said in preparation for the next question. I am sorry, your Honor, that your Honor feels that way.

The Court: I think it was leading, very highly leading.

Mr. Boochever: Very well, your Honor.

Q. (By Mr. Boochever): Did you have other conversations [91] with him about that matter, Mr. Ehrendreich? A. About the stock situation?

Q. About his compensation?

(Testimony of C. J. Ehrendreich.)

A. Well, just casual conversation. I couldn't point to any specific one, but I do know that we talked it over a number of times even after that.

Q. And did he ever tell you how much stock he was to receive? A. No.

Q. He never told you specifically how much?

A. No.

Q. Did he tell you that he was to get stock at that time, or do you remember what his words were in that regard?

A. Well, at the time he mentioned, he said, "I have got stock," I knew that he had stock in the company prior to that, because he had to have at least qualifying shares, so I interpreted it to mean additional stock, and we also discussed from this angle—he said, "Well, if I get this stock," that is the way he put it, "what will be the effect on my personal taxes?"

Q. And he asked you that question; is that right? A. He asked me that question.

Q. Do you know what the amount of work was that he had to do in connection with the Admiralty Alaska Gold Mining Company?

A. Pretty generally; yes. [92]

Q. What did it consist of?

A. There was a finishing up, or we were just about at the finishing up point on the D.M.E.A. contracts. I had recently completed the protest on the audit that the D.M.E.A. auditor had made. This was several months before. So, we had that point cleared up. Then, as I recall it, there was still a

(Testimony of C. J. Ehrendreich.)

little bit of subcontract work that had to be done, some D.M.E.A. reports to be filed, and payroll taxes, and just about that time, or just prior to that time, some of the stock records, that is, the capital stock records, had come back from the transfer agent in New York, and on top of that there were some of these eight per cent, or six or eight per cent, stockholder notes on the books that they were trying to clear up.

Q. And did that involve a fairly substantial amount of work?

A. A considerable amount of pencil work; yes.

Q. Did you yourself have any knowledge of how much time Mr. Coughlin was putting in on the work?

Mr. McLean: I object. It calls for a conclusion.

The Court: No, it doesn't. I overrule the objection. He asked if he himself of his own knowledge had any idea.

A. Yes, I do have a pretty good idea. That was about the beginning of my tax season, so I put in a considerable [93] amount of evening work, and I know that Mr. Coughlin was there, oh, two or three evenings a week at least in addition to being in and out a number of times during the day.

Q. Was your office adjoining the office of Admiralty Alaska Gold Mining Company?

A. Right next door.

Mr. Boochever: That is all.

(Testimony of C. J. Ehrendreich.)

Cross-Examination

By Mr. McLean:

Q. Mr. Ehrendreich, did I understand you to say that, when you were the secretary-treasurer, did you furnish the clerical and the office space in addition to your services? A. Yes.

Q. All for seventy-five dollars a month?

A. That is right.

Q. And this meeting you spoke of wherein you, and Mrs. Ehrendreich was outside your office door, that was a conversation after you turned the books over to him and so forth? A. That is right.

Mr. McLean: No further cross. [94]

Redirect Examination

By Mr. Boochever:

Q. Mr. Ehrendreich, do you know if Mrs. Ehrendreich heard that conversation?

A. I don't know, and I have never mentioned or she has never mentioned anything to me. She may have, because she was well aware of some of the affairs of Admiralty Alaska. In fact, she used to post the cash books.

Q. Well, you had never before, you had never told me about Mrs. Ehrendreich being present at that conversation, had you? A. No.

Mr. Boochever: Now, your Honor, I was hoping we would get through with this today, and I don't intend to call Mrs. Ehrendreich, but if counsel feels

(Testimony of C. J. Ehrendreich.)

it is important, I will ask for time to do it and have her in tomorrow, because I don't feel it is probably material and I don't know whether she remembers the conversation or not, but I don't want to be in a position of not producing all available witnesses, so I will abide by your Honor's decision on that. If it is desirable, I will subpoena her.

The Court: I have no opinion on the subject at all.

Mr. McLean: I don't intend to press it any more as far as Mrs. Ehrendreich is concerned.

Mr. Boochever: All right. Then I will not subpoena [95] Mrs. Ehrendreich, but I want it understood I am not doing——

The Court: Well, in view of the fact that you do not have the rule, equally within the knowledge of the deceased, in Alaska, it isn't so important.

Mr. Boochever: Very well, your Honor.

Mr. McLean: I don't intend to argue, counsel, that, if she were here, she would state differently.

The Court: The Court has to admit that in every lawsuit I learn some new law, because you have by statute changed a lot of our common law rules in other jurisdictions.

Mr. Boochever: I have no further questions to ask Mr. Ehrendreich.

Mr. McLean: No further cross.

The Court: You may step down.

(Witness excused.)

WAUNALEE TURNMIRE

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, please?

A. Waunalee Turnmire.

Q. Are you related to Mrs. Coughlin, the plaintiff in this suit? [96]

A. Yes. I am her daughter.

Q. When did you come to Juneau in 1955?

A. July 1st.

Q. And did you live with Mr. and Mrs. Coughlin for a while after that? A. Yes, I did.

Q. Did you ever hear Mr. Coughlin discuss any arrangement he had with Admiralty Alaska Gold Mining Company pertaining to remuneration?

Mr. McLean: The same objection, your Honor, on the grounds that this discussion—she is not a party, and there is no groundwork been laid as to what the circumstances of the discussion were. It certainly wasn't in connection with business, since she is a part of the family, and I think it has no materiality.

The Court: The Court may be wrong, but I interpret this statute to mean, to state, to mean what it says. It says, "Statements of the deceased whether oral or in writing concerning the same subject may also be shown." Now, oral statements may be shown, I guess, so we will take the testimony.

(Testimony of Waunalee Turnmire.)

Q. (By Mr. Boochever): What was said in that regard, Mrs. Turnmire?

A. Well, I don't remember anything specifically but one incident.

Q. Who was present at that? [97]

A. Mr. Coughlin and my mother and myself.

Q. And where did this conversation take place?

A. In their home.

Q. And approximately what month and what year was that?

A. Well, it was still in the summer.

Q. What year? A. Of 1955.

Q. And what was said at that time to the best of your recollection?

A. Well, Bob was going to the office and——

Q. By "Bob" do you mean Mr. Coughlin?

A. Mr. Coughlin; yes. And my mother said, as nearly as I can remember, "Pop, you better get those shares from Sam," and I remember that Bob said, "Oh, he will give them to me."

Q. And was there anything further said at that time? A. Not at that time; no.

Q. And did you hear any other conversation pertaining to this matter?

A. Not that I can remember specifically, but I do remember that.

Mr. Boochever: No further questions.

Mr. McLean: No cross.

The Court: You may step down.

(Witness excused.) [98]

Mr. Boochever: I will call Mrs. Coughlin.

Mr. McLean: Your Honor, before the interrogation begins, I only wish to state that I think a good deal of this rebuttal testimony isn't properly rebuttal testimony in evidence. I think we have gone a little far afield from what is considered proper rebuttal.

The Court: He couldn't have put this testimony in until after the defendant had testified. You see, that is what the statute says.

Mr. McLean: Yes, your Honor. I can get that as a point, your Honor, but I think we are missing now what is the principal part of the case and going into rebuttal evidence that isn't proper rebuttal.

Mr. Boochever: Well, your Honor, I can't see anything more proper rebuttal and in answer to Mr. Pekovich's interpretation of this agreement than what is being presented.

MINNIE COUGHLIN

called as a witness on her own behalf, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. Mrs. Coughlin, have you ever discussed with your husband, Mr. Coughlin, the work he did for Admiralty Alaska Gold Mining Company?

A. Many times. [99]

Q. And what did he say pertaining to that?

A. Well, I complained about the time he was

(Testimony of Minnie Coughlin.)

putting in down there for this seventy-five dollars a month, and he kept reminding me that he had these shares coming.

Q. Did he say how many shares he had coming?

A. Four thousand.

Q. Did he ever show you the agreement that he had?

A. Yes, he did. And may I go on and explain, your Honor?

The Court: It depends. You see, the danger of that is that certain testimony is not admissible and a witness may get into the realm of inadmissibility, and so it is best to answer your lawyer's questions.

Q. (By Mr. Boochever): Can you describe how he happened to show you the agreement?

A. Well, he brought it home and told me to please take good care of it, this note promising the shares, that that was all the evidence he had that they were forthcoming, and he said, "If anything happens to me, don't lose this," and that was repeated many times, and we put it in the writing desk in the living room in a particular drawer, and it was to be there.

Q. Now, did you have discussions on this just on one occasion or on a number of different occasions?

A. Many occasions.

Q. Do you of your own knowledge know how long and how much [100] hours Mr. Coughlin put in for Admiralty Alaska Gold Mining Company?

A. I have tried to remember. He was there all

(Testimony of Minnie Coughlin.)

of the time almost that he was not out on the Forester.

Q. Is that Forester a boat in which Mr. Coughlin had an interest?

A. Yes; that is the boat in which he had a half interest. They make a weekly mail run which usually takes about three days. The remainder of the time Mr. Coughlin was to be found, every time I wanted to get him, in the Admiralty Alaska office.

Q. Did you ever work there with Mr. Coughlin?

A. I did during one spring, the spring of 1955. I spent nine days there helping without remuneration to set up files and get some order in a place where no clerical work had been done. I set up files for the company, made labels for all of the folders. We bought necessary folders. Mr. Pekovich endorsed purchasing them from Burford's. And I tried to make, as nearly as I could, a logical filing system.

Q. During those nine days was your husband working there? A. Yes.

Q. All the time?

A. Yes. I didn't go down when he wasn't there.

Q. Now, during the winter months did your husband go out on [101] the boat, the Forester?

A. No; he didn't.

Q. Do you know what he did, about how much time he was putting in in the Admiralty Alaska Gold Mining Company office?

A. He put in much more than the three or four days a week that he did when he went out on the

(Testimony of Minnie Coughlin.)

boat, almost full time. He conducted some business for the Island Transportation Company.

Q. Did he answer—do you know if he answered correspondence for Admiralty Alaska?

A. Yes; he did.

Q. What other work do you know of your own knowledge that he did for them?

A. He prepared reports, and he met emergency conditions for orders, for supplies, for personnel, and for a company from Funtar Bay or from—I guess that is where it is—and, in short, was on call. I used to complain that he never got to stay home on Sundays because he always went down there and worked on Sundays.

Q. Now, do you know if—did he ever explain why he had not received the four thousand shares?

A. Yes; he did.

Q. What did he say was the reason?

A. He said that Mr. Pekovich's shares were tied up by the [102] S.E.C.

Q. Do you know if he ever wrote to the S.E.C. about that?

A. I have a letter in my possession that indicates that he did.

Q. Did he ever discuss writing it, writing a letter to the S.E.C.?

A. Yes; he did. I helped him write it, or helped him phrase it.

Q. Did you see the letter itself?

A. Yes; I did.

Q. Do you have a copy of that letter?

(Testimony of Minnie Coughlin.)

A. No; I don't. It must be in the files of the Admiralty Alaska Company.

Q. What did that letter state?

A. It explained, after a good deal of discussion—he was going to say that he had five thousand shares, and I said, “Well, Bob, you don't have five thousand shares. You only have one thousand plus a promise for four thousand,” and he discussed the word “beneficial,” and that was the word that was suggested to him to use, by an attorney, to explain the tentative nature.

Q. Beneficial what?

A. Beneficial—whatever the phrase is in the letter. I have forgotten just how it reads.

Q. Now, do you have any letter from the S.E.C. acknowledging [103] that letter, that is, in your files?

A. Yes, I do.

Q. I will show you what purports to be a letter, dated December 3, 1954, from the Securities and Exchange Commission, and ask if you can identify that?

A. Yes, I can.

Q. What is that?

A. It is a letter from them directed to Bob which arrived at the house, and the envelope in Bob's notation on the back shows that it was received at our house, discussing the matter of this——

Q. Of the letter that Mr. Coughlin wrote?

A. Yes; and naming the date of his letter as November 4, 1954.

Mr. Boochever (Handing document to counsel for

(Testimony of Minnie Coughlin.)

defendants): I request that this be introduced into evidence as Plaintiff's Exhibit No.—

The Clerk: 4.

Mr. McLean: Your Honor, I think the letter serves no purpose, and we will object to it accordingly, since it is not material to the case at all. There is some reference to five thousand shares in a beneficial interest, but it obviously runs to a discussion of what Mr. Coughlin was doing at the time, and being from the Securities and Exchange Commission there is an inference there that they are interrogating him [104] on what activities the Admiralty Alaska Gold Mining Company was doing, and not to the ownership of any shares of stock. The Court can best judge it by looking at the letter.

The Court: Well, may I see the letter?

(Whereupon, the letter was handed to the Court by the Clerk of the Court.)

Mr. Boochever: Your Honor, my reason for requesting its introduction is proof of a statement from the deceased pertaining to this matter, in accordance with the statute.

The Court: It may be received for that purpose.

The Clerk: It is marked Plaintiff's Exhibit 4.

(Testimony of Minnie Coughlin.)

PLAINTIFF'S EXHIBIT No. 4

United States
Securities and Exchange Commission
Regional Office
42 Broadway
New York 4, N. Y.

In Replying Please Quote

JJP:ee

NY—2859

December 3, 1954.

Mr. Robert E. Coughlin,
Box 529,
Juneau, Alaska.

Re: Admiralty Alaska Gold Mining Co.

Dear Sir:

This is in reply to your letter of November 22, 1954, in which you ask to be informed of the regulations covering our request for certain information re holdings of officers, directors and principal stockholders of the above-named company.

The Securities Act of 1933 passed by Congress for the purpose of providing full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent frauds in the sale thereof, authorizes this Commission to investigate sale and distribution of securities. For further details I call your attention to Section 20(a) of this

(Testimony of Minnie Coughlin.)

Act. If a copy of the Act is not available to you, you may obtain a copy by writing to the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. The price for a copy is fifteen cents.

I note that you state in your letter that prior to 1952 you owned no stock in this company but since that time you acquired a beneficial interest in 5,000 shares. Please advise me of the exact date you acquired this interest, and from whom you acquired these shares and what price you paid for them and to whom payment was made. In addition please give me the details of your election or appointment as Vice-President, Secretary and Treasurer of this company.

Your prompt co-operation in this matter will be appreciated.

Very truly yours,

/s/ FRANCIS J. PURCELL,
Regional Administrator.

Received in evidence April 2, 1957.

Q. (By Mr. Boochever): Mrs. Coughlin, that letter refers to—"I note that you state in your letter that prior to 1952 you owned no stock in this company but since that time you acquired a beneficial interest in 5,000 shares." Now, with reference to the one thousand shares which you listed on your

(Testimony of Minnie Coughlin.)

Inventory and Appraisement, do you have the certificate for that? A. Yes; I do.

Q. Has it been transferred on the company's books?

A. No; it hasn't. It still shows issued to Mr. Pekovich, and he has signed it over to Mr. Coughlin on the back, so it never has gone through the books.

Q. And is that why it was referred to—do you know if that [105] is why it was referred to as a beneficial interest and not the actual shares?

A. Yes; yes.

Q. Now, do you know if Mr. Coughlin ever received the four thousand shares that were referred to there?

A. I haven't been with him every minute, but I know that he would have told me. I feel certain that he would have told me, because it came up frequently, and the last conversation was not very long before he died.

Q. What was the nature of that?

The Court: Well, I think it is admitted that they didn't.

Mr. Boochever: Very well, your Honor.

Q. (By Mr. Boochever): In that last conversation, did he give any indication as to whether or not he felt he was entitled to those shares?

A. Yes.

Q. What did he say in that regard?

A. He said he has "them coming. Sam will give them to me. I know he will. I have perfect faith in him," and he reiterated that.

(Testimony of Minnie Coughlin.)

Mr. Boochever: That is all.

The Court: You may cross-examine. [106]

Cross-Examination

By Mr. McLean:

Q. Mrs. Coughlin, do you know from what sources the principal income came to Mr. Coughlin?

A. I know that for two years we had no principal income. We spent money that we had gotten from sale of the Peterson Refuse Company, and that is what we were living on.

Q. And you did not have an income from the Island Transportation Company?

A. Sporadically. And that was—if you wish to call Mr. Gallagher to the stand—well, he has just left now—but that was far from an income-producing place. They did not take a salary during the winter, either of them.

Q. Did not Mr. Coughlin work on the Island Transportation Company affairs in the office?

A. Yes. They took what they could afford to in view of the mortgages that were held against the boat, which were considerable.

Mr. McLean: No further cross.

Mr. Boochever: No further questions.

The Court: You may step down, Mrs. Coughlin.

(Witness excused.)

Mr. Boochever: The plaintiff rests, your [107]
Honor.

Defendants' Surrebuttal

WASO SIVIN PEKOVICH

called as a witness on behalf of the defendants, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. McLean:

Q. Mr. Pekovich, there has been introduced in evidence since you were last on the stand a letter from the Securities and Exchange Commission. I hand you this document. Do you recognize it?

A. Yes; I do.

Q. What is it?

A. A draft of a letter that was sent to all the stockholders of the Admiralty Alaska Gold Mining Company.

Q. Is it an exact copy of a letter that was sent to all the stockholders?

A. All I know, and to the best of my belief, it is exact, because Bob wrote this letter and he——

Q. And you say, you know of your own knowledge that this is a letter written by Robert E. Coughlin?

A. Yes; written to all the stockholders, in the form of pamphlets.

Mr. McLean: May it please the Court, I would like to have this marked, and, subject to objection by counsel, introduce it as an exhibit, and, since it is a rather lengthy one—(handing document to counsel for the plaintiff). [108]

(Testimony of Waso Sivin Pekovich.)

Mr. Boochever: I don't feel that this is material at all, but I have no objection to it.

The Court: It may be received.

Q. (By Mr. McLean): Did this letter——

The Court: What is that exhibit number?

The Clerk: That will be marked Exhibit F.

The Court: F?

The Clerk: F.

DEFENDANTS' EXHIBIT F

To the Stockholders,
Admiralty Alaska Gold Mining Co.

Ladies & Gentlemen:

Just recently you have been sent quite a comprehensive report on the work so far done under the Defense Minerals Exploration Administration's financing, and while the work is still going on satisfactorily, we may bring you up to date on that in the annual report after the meeting takes place in February.

Our company is becoming more and more important and all of you are urged to show your active interest in your company by attending the meetings, if at all possible, or at least to return your proxy without fail.

There never was any dissention among the officers and directors, nor the management of your property, but considerable time is consumed to classify

(Testimony of Waso Sivin Pekovich.)

Defendants' Exhibit F—(Continued)

the proxies. That can be avoided if you will check off the name of the proxy you desire.

We are giving you a list of the names of the officers and directors likely to be present at a meeting, also the general manager of our operation, and you should designate one of them as your proxy, or anyone else you wish. The only interest we have is that you vote. Henry Roden, President; Robert E. Coughlin, Vice President; James Gerald Williams, Director; W. S. Pekovich, General Manager, all of Juneau. Norman C. Stines, San Francisco, California, Managing Director, and Arthur F. Erickson, Seattle, Washington, Director, will probably not be present, but they have the right to delegate your proxies if you wish to select them.

It should be of interest to you to know that the New York office of the Securities and Exchange Commission have been looking into what is said to be "broker's transaction" in the stock of the Admiralty Alaska for the first time in the company's more than 35 years history. Such investigation was made in December, 1953. While that is claimed to have been a routine investigation, the market of your stock broke from around 35c to below 15c a share. Representatives of our company demanded an interview with the proper officials of the Securities and Exchange Commission and were told that the investigation was one done as routine and had nothing to do with the Admiralty Alaska as such.

(Testimony of Waso Sivin Pekovich.)

Defendants' Exhibit F—(Continued)

The same sort of investigation has been going on and annoying letters have been sent to some of our stockholders.

Twice we have requested the Securities and Exchange Commission officials to indicate the rules under which they think they have a right to do what they have done, and so far we have had no reply. Since it is claimed to be routine, the investigation should be over soon, and no harm can come from it. We want you to know what is going on and that your company is in no way involved in that investigation. This we consider material facts as defined by the rules and regulations of the Securities and Exchange Commission. So that you will be assured of your company not being concerned with this routine investigation, we can do no better than quote typical statements from letters sent to various stockholders that came to our attention and signed by Mr. Francis J. Purcell, Regional Director, New York Office, Securities and Exchange Commission:

“The fact that this letter is being sent to you should not be regarded as reflecting on the character or reliability of the above-named corporation nor as an expression of opinion on the part of the Commission that any violation of law has been committed.”

If this happened to be not routine and contrary to what was stated, you will be furnished full text of the essential correspondence between the com-

(Testimony of Waso Sivin Pekovich.)

Defendants' Exhibit F—(Continued)

pany and the New York office of the Securities and Exchange concerned.

Some time ago, the Admiralty Alaska filed for permission to sell 600,000 shares of stock and the value declared was 50c. That was for record only and to comply with the rules and regulations of the Securities and Exchange Commission calling for price as it had been on the open market two weeks prior to the filing. You were previously informed our company, practically speaking, sold no stock on the open market at any time. In that respect, the policy of the company has not changed, nor is there any present intention to sell on the open market, but merely to clear it for possible sale in case of future need for funds and delivery of such stock in a large block. We believe that if sold at all, it will be to foreign buyers and at a better price. In comparison to our former finances, our company is in fine shape and in no hurry to get additional funds.

As stated, the company had no stock to offer at the present time for distribution. Any of you wishing to secure priority in the event stock, when and if offered in the future, may designate the number of shares desired, price to be paid, and for how long the order stands good. Should the stock be offered to the public, you will be allotted the amount requested or on a pro rata basis in performance to

(Testimony of Waso Sivin Pekovich.)

Defendants' Exhibit F—(Continued)

any non-stockholder in the same amount and at the same price.

Please Understand This Is Not to Be Wrongly Construed as Solicitation to Sell Because It Definitely Is Not, but Merely the Expression of Your Right to Preference.

Very truly yours,

ADMIRALTY ALASKA GOLD
MINING CO.,

ROBERT E. COUGHLIN,
Secretary-Treasurer.

Received in evidence April 2, 1957.

Q. (By Mr. McLean): Does Exhibit F, this particular letter of Mr. Coughlin's to the stockholders, relate to correspondence that he had with the S.E.C. on a number of business matters?

A. (Nodding.)

Q. Indicate yes or no. A. Yes.

Q. Mr. Pekovich, do you know, or did you know, that Mr Coughlin had written such a letter as Plaintiff's Exhibit No. 4?

A. No; not his personal letter, I don't; but that is official letter.

The Court: May I see that last exhibit?

(Whereupon, the exhibit was handed to the Court by the Clerk of the Court.)

(Testimony of Waso Sivin Pekovich.)

Mr. McLean: I have no further questions.

The Court: Do you have anything? [109]

Mr. Boochever: No cross-examination, your Honor.

The Court: You may step down, Mr. Pekovich.

A. Thank you.

(Witness excused.)

Mr. McLean: No further rebuttal. The defendants rest.

The Court: Do both sides rest?

Mr. Boochever: Yes, your Honor.

The Court: Any arguments?

Mr. Boochever: Yes, your Honor; I am ready to argue it.

The Court: Well, I would like to read this (reading to himself).

Mr. Boochever: Very well, your Honor.

The Court: Mr. McLean, what is the particular thing in this letter, Exhibit F, that you——

Mr. McLean: Your Honor, it refers to correspondence that Mr. Coughlin had with the S.E.C., and there is comment contained in that that the correspondence——

The Court: It bears no date, does it?

Mr. McLean: It bears no date; no, your Honor; but Mr. Pekovich identified it as being related to correspondence that Mr. Coughlin had with the S.E.C., and, especially since plaintiff has attempted to show a valuation of the stock along about this period, together with the fact that the [110] evi-

dence the defendant relies upon is that Mr. Coughlin realized the value of the stock would depreciate considerably, that he in turn took cash rather than ask for the stock.

Mr. Boochever: I didn't get that last part. I don't think there is any mention of it in the letter at all.

Mr. McLean: There is nothing in the letter.

The Court: That is a matter of argument, I guess.

Mr. McLean: It is a matter of valuation of the stock.

The Court: He is referring to what happened in December of 1953. It doesn't say what date this letter is. Did you say '55?

Mr. McLean: He said it was related to—there is no date on it, your Honor. I don't know how you can——

The Court: I don't know either. I don't know how you can relate it to anything, except that the only one statement in there is that the investigation of December, 1953, caused the stock to break to below fifteen cents a share, and that may be a matter or ground for argument as to the reason you claim that he took money instead of stock. Very well.

The Clerk: Before proceeding with the argument, the Clerk would like to know if the minutes of the stockholders, February 1, '54, was ever admitted into evidence?

The Court: No. That part was separated out.

Mr. McLean: I inadvertently left it on the [111] Clerk's desk.

The Court: Let's take a five-minute recess.

(Whereupon, Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore; and the trial proceeded as follows.)

The Court: You may proceed.

Mr. McLean: Your Honor, if the evidence supports it, we would like permission to amend the affirmative defense to read, in effect, a counterclaim for any sums of money drawn by Mr. Coughlin over and above any stipulated salary. The evidence does contain some copies of checks for three hundred and fifty dollars, labeled "Advanced by W.K.P.," which, if the Court finds the evidence supports it, we wish to assert as a counterclaim.

The Court: Well, I think—is there any objection?

Mr. Boochever: Well, your Honor, before going to trial on this, I wrote to—Mr. McLean asked that, if he should have to amend his complaint, if I would consent to it in view of his going to trial on such short notice, and, since I agreed to that, I am not in a position to object to his request, though I am sorry that he made it so late.

The Court: Well, there is precedent for—pleadings have been amended after judgment even, so the amendment will be allowed.

Mr. Boochever: In that case, your Honor, I think [112] that the record should show that we

deny that any amount is due to the defendant on the counterclaim.

The Court: Very well.

Mr. McLean: Defendant would waive reporting of the argument.

Mr. Boochever: I am willing to waive reporting of the argument, too.

The Court: Very well.

(Whereupon, the court reporter was excused from the courtroom, but was thereafter recalled, and the following proceedings were had.)

Mr. McLean: May I add, your Honor, my client says that he is reluctant to bring out a great deal of evidence to support anything because of this long-standing friendship, and I think that under those circumstances, your Honor, that it should be either withdrawn altogether, in view of the situation and the facts, as I——

The Court: I think that that is probably the best. If you have any claim there at all, it ought to be asserted in a separate action. Therefore, the counterclaim of defendant, as exhibited by Defendants' Exhibit D, involving four checks drawn to Robert E. Coughlin in the total sum of seven hundred and fifty dollars——

Mr. McLean: My client advises me he wishes to withdraw that exhibit. [113]

The Court: Very well. It may be withdrawn, and the counterclaim to that extent will be stricken. As I started to say, the matter of this whole thing here was handled in a very careless, slipshod manner,

and, of course, that is what makes lawsuits, I guess. Even the thousand-dollar certificate, which was given by Mr. Pekovich to Mr. Coughlin to qualify him so he could be a director and serve as vice-president in the past, has not even been transferred on the books of the corporation. The original certificate is still there, it having been signed and delivered but never actually transferred on the books of the corporation. The four thousand dollars, which is set forth in the contract of employment here, Exhibit No. 2, Plaintiff's Exhibit No. 2, apparently, was not delivered because of the fact that the whole thing was under investigation by the Securities and Exchange Commission, and it seems to me that the burden of proof has been sustained by the plaintiff, and it is pretty well established, as far as inferences, reasonable inferences, can be drawn from the testimony, that this exhibit and this stock was in the nature of a bonus and additional to the seventy-five dollars per month.

There was no protest, when Mr. Coughlin started drawing the seventy-five dollars a month, from the corporation or from Pekovich. The testimony is that there was nothing stated about it at all. The Pekovich agreement here was [114] apparently never ratified by the corporation in any respect. It looks as though he personally was assuming something there. It may not be binding on the corporation and probably isn't. I can't believe that the defendant Pekovich didn't know that Coughlin was drawing the seventy-five dollars per month over a period of over a year and nothing done about the

bonus letter or agreement on the four-thousand-dollar, or four thousand shares of stock. It certainly wasn't very businesslike, and he was the general manager of the corporation and should have been more efficient than that in his own business affairs. Apparently, the stock had gone down after this letter was written to where, according to one letter sent out to stockholders, it had dropped in that year to less than fifteen cents a share, so maybe nobody was particularly interested in the stock; but the agreement was still there.

I am not so concerned about the wording of what Coughlin said to Ehrendreich, whether it was "when" or "if." The fact is he was still thinking about getting the stock.

Therefore, I think that the plaintiff may have a decree as prayed for in the complaint and may present findings of fact and law and the judgment.

Mr. Boochever: I will present those tomorrow, your Honor.

(End of Record.) [115]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, No. 7605-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages, numbered 1 to 115, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness my signature this 10th day of August, 1957.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed]: Filed August 12, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska, First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all Orders of the Court filed in the above-entitled cause, and constitutes the record on appeal as designated by the appellants herein to constitute the record on appeal in this case.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court

to be affixed at Juneau, Alaska, this 21st day of August, 1957.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15683. United States Court of Appeals for the Ninth Circuit. W. S. Pekovich and Admiralty Alaska Gold Mining Company, a Corporation, Appellants, vs. Minnie Coughlin, as Executrix of the Estate of Robert E. Coughlin, Deceased, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed August 23, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15683

United States Court of Appeals
For the Ninth Circuit

W. S. PEKOVICH and ADMIRALTY ALASKA GOLD MINING
COMPANY, a Corporation, *Appellants*,

vs.

MINNIE COUGHLIN, as Executrix of the Estate of ROBERT
E. COUGHLIN, deceased, *Appellee*.

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF
ALASKA, DIVISION NUMBER ONE

APPELLANTS' BRIEF

FRED J. WETTRICK,
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Seattle 4, Washington,

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Appellants,

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Estate of ROBERT E. COUGHLIN, de-
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Appellee.

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JURISDICTION

This action was brought in the District Court for the District of Alaska, Division No. One, at Juneau, by Minnie Coughlin, the widow of Robert E. Coughlin, deceased, as executrix of his estate, pursuant to authority of the U. S. Commissioner and ex-officio Probate Judge at Juneau (23).¹

The jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C.A., Sec. 1291.

STATEMENT OF THE PLEADINGS

1. The Complaint

The complaint alleges that on February 5, 1954, defendant W. S. Pekovich, individually and as president

¹ Figures in parenthesis refer to pages of the Transcript of Record, unless otherwise indicated.

of Admiralty Alaska Gold Mining Co., entered into an agreement with Robert E. Coughlin, now deceased, whereby 4,000 shares of the company's stock was to be issued to Coughlin for taking care of bookkeeping and other things in connection with the Defense Mineral Exploration Administration, generally referred to as D.M.E.A.

It is further alleged that Robert E. Coughlin performed the services, but that defendants have failed and refused to deliver the 4,000 shares of stock as agreed, and the complaint prays for judgment against defendants ordering them to deliver to the plaintiff 4,000 shares of the stock of the company, or in lieu thereof the fair market value of said stock, together with plaintiff's costs and disbursements (3-4).

The complaint refers to and is based on an agreement which is attached thereto as Exhibit A and reads as follows:

“Feb. 5-54

“ADMIRALTY ALASKA GOLD MINING Co.

“Main Office:

Box 529, Juneau, Alaska

“Mine Office:

Funter Bay, Alaska

“Mr. R. E. Coughlin

Juneau, Alaska

“Dear Bob:

“This will confirm my understanding with you that if you take care of the bookkeeping and other necessary things in the connection with the D.M.E.A. Admiralty Alaska matter I will give you *in compensation therefor* or cause to be given you

4,000 four thousand shares of the Admiralty Alaska Gold Mining Co. stock.

“IN WITNESS whereof, my hand.

/s/ W. S. PECKOVICH”

(Plaintiff’s Exhibit No. 2, page 27)

Since the fundamental question involved in this case is whether the 4,000 shares of stock were to be given to Coughlin as a bonus or as compensation for his services as a part-time bookkeeper, we have italicized the words “in compensation therefor,” the significance of which will appear as the discussion herein proceeds.

2. The Answer

The Answer of defendants admits that Coughlin performed the services for which he was employed and that the agreement relied upon by plaintiff was made, and alleges that thereafter Coughlin elected to be paid in money instead of stock; that he was so paid in full for his services and hence that he is not entitled to and never claimed the 4,000 shares of stock or any part thereof for his services.

The Answer further alleges by way of affirmative defense that the mining company had at all times an office in Juneau, and one part-time employee to take care of the bookkeeping and other necessary things in connection with its Defense Minerals Exploration Administration matter for which services it paid \$75.00 per month; that at the annual meeting of the Company on February 5, 1954, the part-time employee resigned and that Coughlin was thereupon employed to take over and perform the services as part-time bookkeeper at the

same rate of pay; that at that time the mining company was entirely without funds to pay for the services in money and that it was therefore agreed that the defendant Pekovich would give or cause to be given to Coughlin 4,000 shares of the Company's stock to compensate him for his services from said date on February 5, 1954, to the next annual meeting of the stockholders on February 5, 1955; that in May, 1954, the Company acquired sufficient funds to pay Coughlin for his services in money instead of stock and that Coughlin thereupon elected to receive payment in money instead of stock for his services, and that he was fully paid therefor not only during the Company's fiscal year but until his death in September, 1955 (5-10).

The affirmative defense further sets forth that at no time during the fiscal year mentioned and until his death on September 22, 1955, did Coughlin ever request, demand or claim 4,000 shares of the stock or any part thereof for the services referred to in plaintiff's Exhibit A, or for any other services, for the reason that said agreement of February 5, 1954, had been superseded and nullified by his election to receive his compensation in money instead of stock of the Company.

The case was tried before the District Court of the District of Alaska on the basis of these allegations, which held, in effect, that the plaintiff Coughlin was to receive the 4,000 shares of stock in addition to the \$75.00 per month he was paid for his services, and therefore entered judgment for plaintiff (10-15).

STATEMENT OF THE CASE

This case presents a peculiar situation.² The record shows that ~~plaintiff below~~ ^{Coughlin} was a stockholder and vice-president of the Admiralty Alaska Gold Mining Co., and apparently had been active in its affairs for some time (33).

The Company had the usual ups and downs of mining companies and at the time Coughlin undertook to do its bookkeeping on a part-time basis was in a strained financial condition. Since there was no money immediately available to pay the \$75.00 a month which had been paid to the previous bookkeeper on a part-time basis, the question was how this should be carried on. Coughlin was in a position to undertake this work in addition to his other activities and indicated a willingness to do it, but the question was how he should be compensated therefor. Defendant Pekovich, who was general manager of the mining company, proposed to give Coughlin 4,000 shares of the Company's stock for doing the work until the next annual meeting. This was quite logical because at that time the stock of the Company could be sold at prices which made the 4,000 shares worth practically the equivalent of \$75.00 per month for one year (34, 51).

Thereafter Pekovich went to New York and succeeded in raising about \$25,000.00, which became available to the Company in May, 1954. This money evidently looked better to Coughlin than the shares of stock and he therefore decided that he would prefer the cash (35).

²The question involved is entirely one of fact and the conclusions to be drawn therefrom, and therefore no court decisions are referred to herein.

If it is not clear from the record whether Coughlin just paid himself out of the funds of the Company or discussed it with Pekovich and got the latter's approval, but the fact is that in May, 1954, he received or was paid \$225.00 as his salary for February, March and April, and that thereafter he continued to receive \$75.00 a month, not only for the balance of the fiscal year, but continued until he died in September, 1955 (Dfts. Exhibit A, page 76).

The record also shows that Coughlin's predecessor, who was a certified public accountant, received the same compensation and that he did the work from his own office, whereas Coughlin as a bookkeeper was provided with an office and other facilities and yet received the same compensation (37, 47). It also appears that Coughlin's successor undertook the work for \$75.00 a month and that this was regarded as adequate compensation for a part-time job which could be performed at the convenience of the holder thereof (42). Under the circumstances, it is difficult to see how the court could reach the conclusion that it did. At one point in the proceeding, the court seemed convinced that there was nothing to the claim. At pages 45-6 of the Transcript, the court said:

“Well, so far, here is what we have. Now, let's look at it coldly. We have a company that had ordinarily paid the secretary-treasurer for this work and other work the sum of seventy-five dollars per month, according to the testimony. The company was broke when they made this deal with Mr. Coughlin, who had formerly been a vice-president and was very familiar with the situation of the company, so Mr. Pekovich, the defendant herein,

wrote this letter. Thereafter, Coughlin, the deceased, drew seventy-five dollars per month. Now, certainly, he can't get both the stock and the money."

Of course, this statement was made before all of the evidence was in, but we respectfully submit that nothing was adduced on this record which would justify a different conclusion than that indicated by the first impression of the District Judge.

ASSIGNMENTS OF ERROR

It is our contention that the court erred and that judgment should be reversed upon the following grounds:

1. That the agreement referred to in the complaint and attached thereto as Exhibit A shows conclusively that the 4,000 shares of stock were to be issued to Coughlin as full compensation for his services, and that the court erred in holding to the contrary.

2. That when plaintiff in his capacity as the book-keeper (Secretary-Treasurer) received or paid himself \$75.00 per month for his services, he thereby elected to take cash instead of stock and the court erred in holding that he was entitled to both.

3. That the findings of fact, conclusions of law and decree are not supported by the evidence.

ARGUMENT FOR APPELLANTS

The Complaint Should Have Been Summarily Dismissed

In view of the written agreement and the foregoing undisputed facts, we might well rest the case on what has already been said.

The Pekovich letter of February 5, 1954 (Plaintiff's Exhibit No. 2, page 27) specifically states that the 4,000 shares of stock were to be given to Coughlin *in compensation for* his services. If this stock had been intended to be in addition to a salary, Pekovich would undoubtedly have so stated in his letter.

In view of the unqualified statement in the letter that the 4,000 shares of stock were to be in compensation for the services, it should only be necessary to consider the fact that Coughlin took the \$75.00 a month for his services, and that he is therefore not entitled to the stock. This was the opinion of the court after it had heard the evidence in chief of plaintiff and a substantial part of the testimony of defendant Pekovich, as shown by the statement above quoted.

Notwithstanding these considerations, the court admitted evidence designed to show that the 4,000 shares of stock were to be given to Coughlin in addition to the stipulated salary of \$75.00 per month. This testimony is extremely vague and in large part hearsay, but since it was entertained by the court, we shall briefly refer to it here and then consider the evidence upon this point offered on behalf of defendants.

The Evidence Does Not Sustain Plaintiff's Contentions

To begin with, plaintiff Minnie Coughlin merely identified the letter of February 5, 1954, to her deceased husband from Pekovich, stated that her husband had performed the services and that he had not received the 4,000 shares of stock (24-29).

Later she testified that on November 4, 1954, her hus-

band wrote a letter to the Securities Exchange Commission to which she received a reply dated December 3, 1954 (Plaintiff's Exhibit No. 4, 134-5) from which it appears that Coughlin had stated in his letter that prior to 1952 he owned no stock in the Company but since that time acquired a "beneficial interest" in 5,000 shares. This would seem to indicate that by that time Coughlin had conceived the idea that he might claim both the stock and the salary he was receiving, but as will appear later he never even intimated to defendant Pekovich that he had any such idea.

Another witness for plaintiff was C. J. Ehrendreich who had preceded Coughlin as bookkeeper for the Company at \$75.00 a month. He was a certified public accountant and was also secretary-treasurer of the Admiralty Alaska Gold Mining Company (113).

After some discussion as to whether he could testify as to conversations he had with Coughlin, and the court taking the view that this was in order under an Alaska statute, he testified that around the end of January, 1955, they discussed pretty generally the work and Coughlin said: "I can see now why you kept saying that \$75.00 wasn't enough" and I said, "Well, Bob, my understanding is that you settled for the same thing." He said, "Well, I have got some stock." He didn't mention the amount but he said, "Well, I have got some stock" (121).

From this it appears that Coughlin never told Ehrendreich that he was to receive 4,000 shares of stock in addition to the 1000 shares already had.

This certainly does not prove that Coughlin was to re-

ceive the 4,000 shares in addition to his \$75.00 a month, but even if Coughlin had said so or thought so, it would not establish the fact. He never took that position with the defendants and they did not know that he thought he was entitled to both. Pekovich had written him that he was to receive 4,000 shares in compensation for his services since cash was not available, and naturally assumed that when Coughlin paid himself the \$75.00 as soon as money became available that he was taking the money in lieu of the stock.

Incidentally, it appears from the cross-examination of witness Ehrendreich that when he was secretary-treasurer of the Company, he furnished the clerical and the office space in addition to his services, all for \$75.00 a month (124). He was a certified public accountant whereas Coughlin was merely a bookkeeper who did the work in the office of the Company and was provided with clerical help.

Defendant's Exhibit C was produced at the request of counsel for plaintiff and contains the Minutes of the Annual Meeting of the Stockholders held February 7, 1955. Among the stockholders listed as present and the number of shares each had, there appears the name of Robert E. Coughlin with 5,000 shares. Coughlin was then secretary of the Company and he prepared the Minutes. The listing of 5,000 shares as belonging to him therefore is merely in the nature of a self-serving declaration. In any event, this does not prove that he was entitled to the 4,000 shares in addition to his monthly salary.

The 4,000 shares were to be compensation for the

services from February, 1954, to February, 1955, but Coughlin took cash instead and continued right on after that fiscal year with no bonus. But no matter what Coughlin may have thought, he waived any claim to the 4,000 shares when he took cash in lieu thereof, and anything he may have done in his capacity as a bookkeeper or otherwise to make it appear that he was to receive both, or that the stock was intended as a bonus, is of no effect and does not bind the defendants.

Another of plaintiff's witnesses was Mrs. Turnmire, her married daughter. She testified that she came to Juneau on July 1, 1955, and lived with Mr. and Mrs. Coughlin. She testified that she heard them discuss this matter at one time and was asked what was said at that time, to which she replied that one day in the summer of 1955, Mr. Coughlin was going to the office and as near as the witness could remember, her mother said: "Pop, you better get those shares from Sam" and Bob said "Oh, he will give them to me." The witness said she could not remember anything else specifically but she did remember that (126-7).

Of such is the evidence on which plaintiff relies to overcome the specific statement in the letter of February 5, 1954, that the 4,000 shares of stock were to be in compensation for the services.

As against this vague and uncertain evidence of plaintiff, we have the written confirmation of Pekovich addressed to Coughlin which specifically states that if the latter would take care of the bookkeeping and other necessary things "I will give you in compensation therefor or cause to be given you 4,000 shares of the Admir-

alty Alaska Gold Mining Company stock," and the undisputed and admitted fact that Coughlin received \$75.00 a month, not only for the period for which he was otherwise to receive the stock, namely, for the year ending February 1, 1955, but also for each month thereafter until he passed away in September of that year.

The numbers of the checks, the dates, the purpose and the amount of each payment are set forth in defendant's Exhibit A, which appears on pages 76 and 77 of the Transcript of the Record.

Coughlin began his work for the Company at the time of the annual meeting on February 1, 1954, when there was no money in the treasury of the Company to pay him in cash for his services. When funds became available later in May, 1954, Coughlin evidently felt that he would prefer to be paid in cash for his services than to rely upon the uncertain and fluctuating value of the corporation's stock; so on May 28, 1954, as the secretary-treasurer of the Company, he issued himself a check for \$225.00 to cover his salary for February, March and April and followed this course not only to the end of the year for which he was originally employed, but until he died in September, 1955, as shown by the exhibit referred to (76).

When Pekovich was examined with reference to the agreement with Coughlin, he testified as follows (pages 34-35 of the transcript):

"Q. Now, at the time you wrote that letter to Mr. Coughlin you used the language 'if you take care of the bookkeeping and other things in the connection with the D.M.E.A.' Did you mean that he'd take over the work of secretary-treasurer?

A. Yes, I did.

Q. Your letter further reads, 'I will give you in compensation therefor or cause to be given you four thousand shares of the stock.' What did you mean by that?

A. Well, 'cause' to give him, I thought if the board of directors don't agree with my agreement that I would pay it myself, personally; that is why 'I give you or cause to be given to you.'

Q. But it wasn't actually the company—it was on behalf of the company that you wrote the letter?

A. Oh, yes.

Q. And why was it that you specified four thousand shares of stock?

A. Because at that time the company was practically to zero financially, and we had been struggling for a long time before to meet matching government loans and all, and I think we didn't have at that time in the bank only a few hundred dollars; Bob knows as well as I did, and probably better, because he was vice-president of the company; and I could not ask him to do the work for nothing, so I gave him the stock, which at that time was worth around eight hundred dollars.

Q. Mr. Pekovich, when you wrote the letter, did you intend that that be the salary for the work of secretary-treasurer?

A. I did.

Q. Now, subsequently to that date did anything transpire as far as the secretary-treasurer's salary was concerned?

A. Soon after that time, I think the beginning of March, I went to New York. I raised about twenty-five thousand dollars of my own, which I put at

the disposal of the company and at the disposal of Bob, and from that time on he drew the salary right along.

Q. And then you say he drew a salary?

A. Yes. He drew a salary of seventy-five dollars a month.

Q. Now, prior to the time he drew the salary and when you entered into this agreement or wrote the letter was the four thousand shares of stock for the salary?

A. It was originally intended to.”

After an interruption, Pekovich continued as follows (page 36 of transcript of record):

“Q. (By MR. McLEAN): Mr. Pekovich, you said that Mr. Coughlin drew a salary of seventy-five dollars a month while—after you had obtained some monies from New York?

A. The first two or three months he didn’t draw the salary because he didn’t have the money. Then he accumulated, drew accumulated, I think, two hundred and twenty-five dollars at one time, but it was covering from the time he took over.

Q. Did you consent to the withdrawal of that as a salary?

A. Oh, yes. I consented to that; and, as a matter of fact, if I had the money at that time, I wouldn’t have asked him otherwise.

Q. And what was your understanding on the withdrawal of that salary in the form of cash?

A. That was a full compensation when he was drawing seventy-five dollars. That is the same salary as we paid before.”

On page 38 of the transcript, the following testimony appears:

“Q. (By MR. McLEAN): What conversation did you have with Mr. Coughlin with respect to withdrawing the salary, Mr. Pekovich.

A. Well, as a matter of fact, I don't know that we had any conversation, but we did have a conversation about assuming stock for the payment to following annual meeting.

Q. And what was the conversation, as best you can remember, as to Mr. Coughlin's claim on the stock after he had been drawing the salary.

A. He never did claim the stock.

Q. You say he—

A. No; he didn't.

Q. Can you recall what, in effect, Mr. Coughlin told you with respect to his claim on the stock?

A. He never told me anything. That wasn't brought up at all, one way or the other. After he started drawing salary he finished that year that way. Then he started another year and was up to September on the same salary without any stock, without any other compensation except the seventy-five dollars a month.”

On page 55 of the transcript, Pekovich testified that Coughlin never made a demand upon him for the 4,000 shares of stock or say anything to him about it.

We think it is clear from the foregoing testimony of Pekovich that Coughlin was to receive the 4,000 shares of stock as compensation for his services and nothing else, and that the latter chose to pay himself therefor in cash when money became available to the company.

On cross-examination of Pekovich, counsel for plaintiff presented him with a letter in his own handwriting addressed to Mr. Roden, who was then president of the company. This was received in evidence as plaintiff's Exhibit No. 3, and is set forth in photographic form on page 70 of the transcript.

Counsel for plaintiff apparently thought that this letter shows that Pekovich intended that the 4,000 shares should be given to Coughlin in addition to his salary, but we submit that it shows exactly the contrary.

While the letter is undated and it does not appear just when it was written, it does throw some light on what the agreement was as Pekovich understood it.

In the first part it refers to the letter of February 5, 1954, and states that it is very plain that the stock had been promised in consideration of the work to be performed, whereas from the books it appears that Coughlin was receiving cash monthly compensation.

The letter clearly implies that the writer did not think that Coughlin was entitled to the stock, but said that if under the circumstances he was to be given the stock, Coughlin's account should be straightened up otherwise. The letter concludes by saying that the stock cannot be delivered before it is registered with the S.E.C. and that Coughlin understood this because he was carrying on all correspondence. This certainly does not indicate that Pekovich thought Coughlin was entitled to the stock, because he had previously expressed himself to the contrary in the letter, but simply said that if it was decided to give the stock to Coughlin

it could not be delivered before it was registered with the S.E.C.

From the foregoing, it appears that Pekovich firmly took the position at all times that the 4,000 shares of stock were to be given to Coughlin as compensation for his services and that when it appeared that Coughlin had paid himself for his services in cash, Pekovich consistently took the stand that Coughlin was not also entitled to the stock.

After Coughlin died, he was succeeded by William S. Dapceovich in the position with the company as secretary-treasurer and bookkeeper at the same salary of \$75.00 a month that the previous holders of the position had received. He identified the statement already referred to as defendant's Exhibit A (76-7) showing the payments Coughlin had received for his services and explained it in detail. He testified that the checks were all issued to Coughlin and signed by him and no one else (78).

Witness Dapceovich testified that the salary to his knowledge was set up as a precedent and that all the previous secretary-treasurers had received the same amount, namely \$75.00. Along with the salary of \$75.00 a month he received, the mining company furnished the office space and all the facilities, and he worked right in the office (100).

Finally defendant's Exhibit E was introduced (106). This is the Inventory and Appraisement filed in the estate of Robert E. Coughlin, deceased, and among other items lists only the 1,000 shares of the Admiralty Alaska Gold Mining Company. It is dated the 2nd day

of August, 1956, and indicates that no claim was made at that time that the deceased was entitled to the additional shares here in question.

It would serve no useful purpose to go into further detail in reciting testimony offered in this case. As we have already indicated we think that the letter from Pekovich to Coughlin dated February 5, 1954 (Exhibit No. 2, 27) shows that the 4,000 shares of stock were to be given as compensation for services, and when it was admitted that Coughlin thereafter paid himself and received the regular salary of \$75.00 a month, that should have been deemed to be sufficient to show that the claim herein made is not valid.

Nothing was adduced in the further evidence to justify a contrary conclusion and the oral opinion of the court does not indicate the reason for changing the opinion previously expressed.

The District Court Erred in Making Its Findings and Conclusions

The oral opinion of the court beginning at page 147, says that this whole thing here was handled in a very careless, slipshod manner, which may be admitted, but that does not justify a decision contrary to the facts as to the real issue involved. Reference is made to the fact that the stock had not been issued because the matter was under investigation by the Securities Exchange Commission, whereupon the court simply said that it seems that the burden of proof has been sustained by the plaintiff and that the stock was in the nature of a bonus and additional to the \$75.00 a month. This is fol-

lowed by the statement that there was no protest when Coughlin started drawing the \$75.00 a month and that he can't believe that the defendant Pekovich didn't know that Coughlin was drawing the \$75.00 per month over a period of over a year.

Pekovich had testified in effect that he did not know that Coughlin was paying himself in cash, or at least he indicated that he did not care. He said in effect that if money had been on hand, he would not have offered Coughlin the stock in lieu thereof and so when money became available, Coughlin evidently felt that it was all right for him to take the money instead of the stock, and if Pekovich knew about it he did not care.

The stock had gone down somewhat in the meantime, which probably explains the reason for Coughlin deciding to take the cash instead of the stock, and since Pekovich wanted Coughlin to have at least the going salary for the position he did not object or would not have objected if he had known about it.

The oral opinion (149) finally states that apparently the stock had gone down after the letter was written and says that therefore maybe nobody was particularly interested in the stock, but the agreement was still there.

The agreement was still there, but that agreement was that Coughlin should receive 4,000 shares of stock in compensation for his services, and the plaintiff herein as his beneficiary should not be heard to complain because he was permitted to take \$75.00 a month instead when the stock had depreciated in value. Under the circumstances, it is certainly not fair to hold that,

since Coughlin decided to take cash for his services instead of the stock which had depreciated in value, she is now entitled to both.

Notwithstanding all of this, the court signed and entered Findings of Fact to the effect that Coughlin was to receive \$75.00 as a salary and as an additional inducement to have him perform the work, Pekovich entered into an agreement to give him in addition thereto 4,000 shares of stock (11-12).

In addition to requiring the defendant Pekovich to deliver to the plaintiff 4,000 shares of common stock of Admiralty Alaska Gold Mining Company, the court gave judgment against him for the costs and disbursements, including an attorneys' fee of \$340.00 (instead of \$450.00 as set forth in the transcript (15)).

CONCLUSION

The judgment was rendered against Pekovich alone and we shall not concern ourselves with the question as to whether the corporation was bound by his acts in this respect. We think it is clear that plaintiff is not entitled to the 4,000 shares of stock and hence that the defendant Pekovich should not be required to pay any costs or attorneys' fees.

Respectfully submitted,

FRED J. WETTRICK,
JOSEPH A. McLEAN,

Dec. 20, 1957.

Attorneys for Appellants.

APPENDIX

Table of Exhibits Pursuant to Paragraph 2(f) of Rule 18

| <i>Plaintiffs' Exhibits</i> | | <i>Identified</i> | <i>Received</i> |
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No. 15,683

United States Court of Appeals
For the Ninth Circuit

W. S. PEKOVICH and ADMIRALTY ALASKA
GOLD MINING COMPANY, a corporation,
Appellants,

VS.

MINNIE COUGHLIN, as Executrix of the
Estate of Robert E. Coughlin, deceased,
Appellee.

APPELLEE'S BRIEF.

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No. 15,683

**United States Court of Appeals
For the Ninth Circuit**

W. S. PEKOVICH and ADMIRALTY ALASKA
GOLD MINING COMPANY, a corporation,
Appellants,

vs.

MINNIE COUGHLIN, as Executrix of the
Estate of Robert E. Coughlin, deceased,
Appellee.

APPELLEE'S BRIEF.

JURISDICTION.

This action was tried in the District Court for the District of Alaska, Division Number One, at Juneau, by the Honorable Raymond J. Kelly, Judge, without a jury. From judgment rendered in favor of the appellee, this appeal has been taken. This honorable court has jurisdiction under the provisions of Title 28 U.S.C.A., Section 1291.

FACTS.

On February 5, 1954, at a meeting of the Admiralty Alaska Gold Mining Company, C. J. Ehrendreich, the

secretary-treasurer, resigned, stating as a reason therefor that the salary of \$75.00 a month "was not ample compensation for the amount of work it was necessary for him to perform for the company." Appellant Pekovich then suggested that R. E. Coughlin, who was present at the meeting, take over the duties of secretary-treasurer. (R. 88.) On this same date Mr. Pekovich gave Mr. Coughlin a handwritten letter stating:

"This will confirm my understanding with you that if you take care of the bookkeeping and other necessary things in the connection the D.M.E.A. Admiralty Alaska matter, I will give you in compensation therefor or cause to be given you 4,000 four thousand shares of the Admiralty Alaska Gold Mining Co. Stock." (R. 27.)

According to a report signed by Mr. Coughlin as secretary-treasurer, the Securities and Exchange Commission had made an investigation of the company in December, 1953, which resulted in the market price of the stock breaking from 35¢ to below 15¢ a share. (R. 140.) Mr. Pekovich testified that on February 5, 1954 the stock had a value of about 20¢ or 25¢ a share. (R. 50.)

During 1954 Mr. Coughlin drew a salary of \$75.00 per month in quarterly installments and in 1955, he drew the same salary at monthly intervals. At the February 5, 1955 annual meeting of the stockholders, Mr. Coughlin was authorized to continue in that employment at the rate of \$75.00 per month and he did so continue until his death on September 22, 1955. (R. 9.)

It was admitted that Mr. Coughlin performed the services as specified in the letter of February 5, 1954 and that neither Mr. Pekovich or the corporation made payment of the 4,000 shares of stock. (R. 7.)

Mr. Coughlin worked three or four full days, and many nights, each week for the corporation and also worked more than that during the winter. (R. 130, 131, 123.) He expected to receive the 4,000 shares from Mr. Pekovich in addition to the \$75.00 monthly salary. (R. 122, 129, 135, 127.) The payment of the shares was delayed due to the Securities and Exchange Commission holding up transfer of Mr. Pekovich's shares. (R. 131, 70.)

After Mr. Coughlin's death, the work was undertaken by one Mr. Dapceovich. The corporation was no longer engaged in a Defense Minerals Exploration Program so that the burden of reports and correspondence in relation thereto did not have to be carried on by Mr. Dapceovich. (R. 104.) Although he initially was hired for a salary of \$75.00 per month, he soon found that the work was too time consuming for that salary and his salary was increased \$50.00 after eight or nine months. (R. 98.)

According to the minutes of the meeting of the corporation of February 5, 1955, Mr. Pekovich, the general manager of the corporation, owned 1,131,143 shares of the stock of the corporation. These same minutes, which were signed by Mr. Roden, the president, showed Mr. Coughlin as having 5,000 shares. (R. 93.) Several years prior to 1954, Mr. Coughlin had been given a certificate for 1,000 shares to qualify

him as a director, but he had never actually received the additional 4,000 shares.

Mr. Pekovich was the one who gave instructions in the operation of the office of the corporation and was the principal person concerned with the corporation. (R. 102.) He never told Mr. Coughlin that his salary of \$75.00 per month was in place of the stock promised by the letter of February 5, 1954 (R. 58) and he never asked for a return of the letter which he gave to Mr. Coughlin for the purpose of having it available in case either of them died. (R. 62.) A letter written by Mr. Pekovich to Mr. Roden, president of the corporation, referred to the agreement to give Mr. Coughlin the 4,000 shares of stock and the fact that Mr. Coughlin drew a salary of \$75.00 per month, but did not claim that the stock was no longer due Mr. Coughlin because of drawing the salary. (R. 70.)

Based on the evidence adduced at the trial, the learned trial judge found that R. E. Coughlin was to receive a salary of \$75.00 per month and that as an additional inducement to have him perform the work, Mr. Pekovich agreed to give or cause to be given to Mr. Coughlin 4,000 shares of the stock of Admiralty Alaska Gold Mining Company. (R. 12.) This appeal has been taken from the resulting judgment awarding the stock to the executrix of Mr. Coughlin's estate.

SUMMARY OF ARGUMENT.

The brief heretofore filed by appellants sets forth no alleged errors of law and is limited to a contention

that the findings of fact and judgment entered thereunder by the court below was not based upon the evidence. A reading of the statement of the case as set forth in the appellants' brief and the argument which follows reveals that appellants' contentions are based on viewing the evidence and inferences therefrom in the most favorable light to appellants' case while disregarding the evidence and inferences supporting the judgment below. It is respectfully submitted that learned counsel for appellants have disregarded the applicable principles of law in cases of appeals from findings made by a trial court. It is well established that

“where there is any admissible or competent substantial evidence on the whole record or reasonable inference therefrom to support the fact determined in the lower court, the fact so determined will not be disturbed on appeal.” 5 C.J.S. pp. 554 to 557.

“... the province of the appellate court is to determine whether there is any evidence from which the trial court might properly have drawn its conclusion. . . . Such findings will not be disturbed when supported or sustained by competent evidence, especially where the evidence is conflicting or where different inferences can reasonably be drawn therefrom.” 3 Am. Jur. Sec. 896, pp. 459 and 461.

This honorable court recently stated in the case of *Hunt Foods v. Phillips*, 248 F. 2d 23 at 31,

“We cannot substitute our judgment for that of the trial court.”

and in earlier cases arising in Alaska this court has held that if there is any substantial evidence in the record sufficient to sustain the findings of the court below, those findings will be upheld on appeal regardless of whether there is conflicting testimony. See *Cascaden v. Bell*, 257 Fed. 926 at 930; *James v. Nelson*, 90 F. 2d 910 at 918; *Schoenwald v. Bishop*, 244 F. 2d 715 at 718; *Cook v. Robinson*, 194 Fed. 753 at 759; *Fleischman v. Rahmstorf*, 266 Fed. 443; *McKinley Creek Mining Co. v. Alaska United Mining Co.*, 183 U.S. 563 at 569, 46 L. Ed. 334.

Admittedly, if all of the testimony in favor of appellee is disregarded and if all of the inferences from the testimony are made adversely to the appellee the case might have been decided in favor of appellants although such a decision, in our opinion, would have been an improper one. The only question on appeal, however, is whether there is any evidence, or when the law is viewed most favorably for the appellants any substantial evidence, supporting the decision of the District Court.

The court below found that Mr. Coughlin was employed by the Admiralty Alaska Gold Mining Company at the salary of \$75.00 per month and that in addition thereto as consideration of his performing the work in connection with the Defense Minerals Exploration Administration contract and related matters he was to receive 4,000 shares of Admiralty Alaska Gold Mining Company stock.

This brief will be addressed to the determination of whether there was any substantial evidence upon

which the court made its findings and resulting conclusions of law and judgment.

I.

THERE WAS SUBSTANTIAL EVIDENCE TO THE EFFECT THAT MR. COUGHLIN WAS TO RECEIVE 4,000 SHARES OF STOCK IN ADDITION TO A SALARY OF \$75.00 PER MONTH.

Mr. Coughlin served as vice-president of Admiralty Alaska Gold Mining Company for some time prior to 1954. On February 5, 1954, at the suggestion of Mr. Pekovich, he was made the secretary-treasurer of the corporation to replace Mr. Ehrendreich who had resigned due to the fact that \$75.00 per month was not adequate compensation for the amount of work involved. Since Mr. Coughlin had been closely associated with the corporation, he was familiar, or must be presumed to have been familiar, with the amount of work involved in the position of secretary-treasurer as well as performing the bookkeeping services for the corporation and the correspondence and other matters pertaining to a Defense Minerals Exploration Administration program. It would certainly be illogical to assume that he would undertake this job at the same salary which caused Mr. Ehrendreich to resign.

Appellants, in their answer, specify that at the meeting of the stockholders on February 5, 1954, Mr. Coughlin was employed to perform the duties previously undertaken by the resigning employee,

“at the same compensation rate of pay, to wit, \$75.00 per month.” (See paragraph 3 of the affirmative defense—R. 8.)

The minutes of the stockholders' meeting do not indicate the salary at which Mr. Coughlin was employed, but the minutes are very loosely worded and in view of the admission contained in appellants' pleadings, it must be assumed that the salary was specified at \$75.00 a month.

On that same day Mr. Pekovich, who was the principal person concerned with the corporation and who according to the minutes of February 1955 owned over one million shares of the stock of the corporation, wrote a letter to Mr. Coughlin stating,

“This will confirm my understanding with you that if you take care of the bookkeeping and other necessary things in the connection with the D.M.E.A. Admiralty Alaska matter, I will give you in compensation therefor or cause to be given you 4,000 four thousand shares of the Admiralty Alaska Gold Mining Co. stock.”

Certainly the reasonable inference to be gathered from the fact that this letter was given on the same date that Mr. Coughlin accepted the employment at the salary of \$75.00 per month is that it was to constitute an added inducement. It would be highly illogical for the letter to be given and the salary to be established on the same day on any basis other than that they were to form two complementary means of compensation.

Certainly Mr. Coughlin would not have undertaken this work upon the promise of the stock alone. Mr. Coughlin wrote a letter to all the stockholders indicating that in December 1953 the Securities and Ex-

change Commission had made an investigation of the company causing the stock to drop to below 15¢ a share. (R. 80.) Even Mr. Pekovich testified that in February 1954 the stock had a value of between 20¢ and 25¢ per share. Knowing that the Securities and Exchange Commission was in the midst of its investigation and knowing that the previous employee quit due to dissatisfaction with a salary of \$75.00 per month, it is only reasonable to conclude that Mr. Coughlin was to secure both the \$75.00 per month and the 4,000 shares as compensation.

This inference is further corroborated by direct testimony which constitutes more than adequate basis for the decision of the court below.

Alaska has a dead man's statute set forth in Section 58-6-1 ACLA 1949 providing:

“§58-6-1. *Matters affecting credibility: Statements of deceased person.* Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded as witnesses; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case, except the latter, the credibility of the witness may be drawn in question, according to the rules of the common law. When a party to a civil action or suit by or against an executor or administrator appears as a witness in his own behalf, statements of the deceased whether oral or in writing concerning the same subject may also be shown.”

The Alaska statute, the last sentence of which was enacted by Chapter 49 SLA 1931, is closely modeled

after the Oregon statute. The Supreme Court of Oregon has repeatedly ruled that statements of a deceased are admissible where the opposing party appears as a witness in his own behalf, and such statements have constituted the basis for affirming judgments of the court below. See *Beard v. Beard*, 133 P. 795; *Goff v. Kelsey*, 153 P. 103; *Mace v. Timberman*, 251 P. 763; *In re Fisher's Estate*,;; *Cook v. United States National Bank of Salem*, 274 P. 1098.

After Mr. Pekovich appeared as a witness in his own behalf, it accordingly became permissible for the appellee to introduce statements made by Mr. Coughlin concerning the same subject.

Mr. Ehrendreich, a disinterested witness (R. 116), testified to a conversation he had with Mr. Coughlin after Mr. Coughlin undertook the job. This conversation is referred to in part in appellants' brief at page 9, wherein it is summarized as follows:

“Coughlin said: ‘I can see now why you kept saying that \$75.00 wasn’t enough’ and I said, ‘Well, Bob, my understanding is that you settled for the same thing.’ He said, ‘Well, I have got some stock’. He didn’t mention the amount but he said, ‘Well, I have got some stock.’ ”

The appellants failed to mention, however, that Mr. Ehrendreich went on to testify further pertaining to this conversation as follows:

“Well, at the time he mentioned, he said, ‘I have got stock,’ I knew that he had stock in the company prior to that, because he had to have

at least qualifying shares, so I interpreted it to mean additional stock, and we also discussed from this angle—he said, ‘Well, if I get this stock,’ that is the way he put it, ‘what will be the effect on my personal taxes?’ ” (R. 122.)

Certainly Mr. Coughlin would not have inquired as to the effect on his personal taxes of securing the stock unless he expected to get the stock in addition to his salary. He could not have been referring to the shares which he had previously received as they had been obtained a number of years prior to the conversation.

Mrs. Turnmire, the step-daughter of Mr. Coughlin, told of a statement by Mr. Coughlin made in the summer of 1955 wherein Mr. Coughlin stated that Mr. Pekovich would give him the stock. (R. 127.)

Mrs. Coughlin told of how Mr. Coughlin brought home the note from Mr. Pekovich promising to give the stock and advised her not to lose the note in case anything happened to him. On many occasions Mr. Coughlin discussed this matter and in fact in the last conversation prior to his death, Mr. Coughlin stated that Mr. Pekovich would give him the stock and that Mr. Coughlin had perfect faith in him. (A. 136.)

Mr. Coughlin had explained that the reason the stock had not been received sooner was due to the Securities and Exchange Commission investigation (R. 131) and this was admitted by Mr. Pekovich (R. 70).

Mr. Coughlin had written to the Securities and Exchange Commission setting forth that he had the "beneficial" interest in the stock. (R. 132, 135.)

In view of the direct testimony referred to above, it would appear to be almost superfluous to discuss the additional testimony from which the court could have inferred that Mr. Coughlin was to receive the 4,000 shares in addition to the \$75.00 a month.

It is significant that Mr. Dapceovich, who succeeded Mr. Coughlin and who undertook the work at a time that no Defense Minerals Exploration Administration program was in force so that the duties must have been considerably less onerous than at the time that Mr. Coughlin performed them, shortly insisted on a substantial raise to do the work.

It is further significant that Mr. Pekovich stated that he gave the letter of February 5, 1954 to Mr. Coughlin so that the written agreement would be available in case one of them should die. In the year and three-quarters, during which time Mr. Coughlin drew his salary, Mr. Pekovich never asked for a return of that letter. Certainly if he felt that it was important to give the agreement in writing in case of the death of either of the parties and if he honestly believed that the agreement was rescinded, he would have requested the return of the letter.

It is further significant that Mr. Pekovich never told Mr. Coughlin that since he was drawing a salary of \$75.00 per month he would not be entitled to the 4,000 shares. (R. 58.)

Counsel makes much point of the fact that the informal letter given by Mr. Pekovich to Mr. Coughlin on February 5, 1954 stated that

“if you take care of the bookkeeping and other necessary things in connection with the D.M.E.A. Admiralty Alaska matter I will give you *in compensation therefor* or caused to be given you 4,000 four thousand shares.”

Counsel infers from this statement that no other compensation could be given Mr. Coughlin for his services as secretary-treasurer as well as in connection with the work described in the letter of February 1954. The letter, however, does not state that it is to be “in full compensation” nor does it state that it is to be “in lieu of salary”. It is certainly just as reasonable to infer from the letter that the compensation of the stock was to be in addition to other compensation furnished by the corporation as to infer otherwise. As indicated *supra*, on appeal inferences in favor of the judgment of the court below rather than opposing inferences will be maintained.

It is further significant that Mr. Pekovich wrote a letter to Mr. Roden, president of the company, discussing the agreement to give the 4,000 shares and the fact that \$75.00 per month in salary had been paid to Mr. Coughlin without stating that the salary was to constitute a substitute for the promise of the stock. Instead, Mr. Pekovich merely referred to the fact that the stock could not be transferred before it was registered with the Securities and Exchange Commission. (R. 70.)

Moreover, the minutes of the corporation for the meeting of February 5, 1955 show Mr. Coughlin as owning 5,000 shares. It was admitted that the only shares which had been transferred to Mr. Coughlin were the 1,000 shares he had previously received to qualify him as vice-president and director. Obviously, the additional 4,000 shares indicated as belonging to Mr. Coughlin were the 4,000 promised by Mr. Pekovich. Counsel for the appellants states:

“Coughlin was the secretary for the company and he prepared the minutes.”

There is nothing in the record to show that Mr. Coughlin prepared the minutes and since Mr. Roden, who ^{WAS} ~~is~~ president of the company and attorney for the company, was the only one who signed the minutes, the inference is that Mr. Roden prepared the minutes. Moreover, regardless of who prepared the minutes, Mr. Roden, by signing them, indicated that the president of the corporation was under the impression that Mr. Coughlin was entitled to the 4,000 shares in addition to his salary of \$75.00 per month.

Appellants refer to the fact that the inventory and appraisal filed by the estate of R. E. Coughlin listed 1,000 shares of Admiralty Alaska Gold Mining stock and did not refer to the additional 4,000 shares. Since Mr. Pekovich had refused to deliver to the estate the additional 4,000 shares, they could hardly be listed as an asset of the estate. The fact that the right to the shares was claimed by the estate is borne out by the authorization to bring this suit. (R. 23.)

From the foregoing it would appear that the greater weight of evidence supported the findings of the District Court leading to judgment for appellee and certainly there is substantial evidence upon which the trial court's judgment may be upheld.

II.

JUST DAMAGES SHOULD BE AWARDED THE APPELLEE FOR DELAY.

Not one objection to evidence or the manner in which this case was conducted has been raised as a grounds for appeal. The only arguments set forth are to the effect that the District Court wrongly decided the case, which argument goes solely to the weight and credibility to be given to the testimony.

An advocate may well lose a sense of proportion pertaining to a case, but if we properly evaluate the evidence in the subject appeal we fail to see any merit to the arguments advanced. If we are correct in that regard and if the appeal may be considered a frivolous one, this learned court is respectfully requested to invoke the provisions of Section 1912 Title 28 U.S.C.A. pertaining to the assessment of costs and damages for delay. See *Fern Gold Mining Company v. Murphy*, 7 F. 2d 613 at 614; *Lowe v. Willacy*, 237 F. 2d 179. In the subject case, the widow of R. E. Coughlin, as administratrix of his estate, has been obliged to employ counsel to defend this appeal. At a considerable expense it has become necessary to print briefs and to pay counsel's expenses in going to the Circuit Court of Appeals for the purpose of arguing

this case. The amount of the stock involved is of highly questionable value, fluctuating, according to the testimony, between 15¢ per share to a maximum of \$1.00 per share. It appears that the monetary value of the stock is relatively small in any event and appellants, by requiring appellee to contest this appeal, are depriving Mr. Coughlin's widow of a sizeable portion of the proceeds to which she was entitled under the judgment below.

If our appraisal of the case is correct, it is respectfully submitted that this is a proper case in which damages for delay should be assessed.

CONCLUSION.

There was ample evidence to support the findings of the trial court below to the effect that Mr. Coughlin was to receive 4,000 shares of stock of Admiralty Alaska Gold Mining Company in addition to a salary of \$75.00 per month. The statements made by Mr. Coughlin in that regard, plus the inference from all of the evidence adduced in the case, more than amply support the judgment of the court below and it is respectfully submitted that that judgment should be affirmed.

Dated, Juneau, Alaska,
January 13, 1958.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
Attorneys for Appellee.

No. 15683

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APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

The undisputed and controlling facts in this case are that Coughlin undertook the work for the going salary of \$75.00 per month, as indicated by the minutes of the stockholders' meeting (R. 88) and admitted at page 8 of appellee's brief. Since money was not available to pay this salary, Pekovich agreed to give Coughlin the equivalent in stock. When money became available, Coughlin took cash in payment for his services. Now Coughlin's widow claims that he was entitled to both. This claim is based on a letter which itself shows that the stock was to be in compensation for the services, and not a bonus. It said:

"... if you take care of the bookkeeping and other necessary things ... I will give you in compensation therefor ... 4000 shares of stock ..."

This letter clearly shows that the stock was to be full

compensation and that Coughlin waived any claim thereto when he took cash in payment for his services. If the stock had been intended to be in addition to the salary, Pekovich would undoubtedly have so stated in his letter. Appellee thinks the inference should be to the contrary because the letter does not state that it is to be "in full compensation" or "in lieu of salary," but it does say that it is to be "in compensation for" the services, which means in full satisfaction and in lieu of any other salary.

On page 8 of the brief it is stated that the letter referred to was given on the same day that Coughlin accepted the employment at a salary of \$75.00 per month, and it is claimed that the reasonable inference to be gathered from this is that the stock was to "constitute an added inducement" and that it would be highly illogical that both would occur on the same day "on any basis other than that they were to form two complementary means of compensation."

But the facts are that the stockholders' meeting at which Coughlin agreed to undertake the work was held on February 1, 1954, as shown by the minutes (R. 86-88), and the letter promising the stock in compensation for the services is dated five days later, February 5, 1954 (R. 27). In view of these facts, the reasonable inference to be gathered therefrom is that the stock did not "constitute an added inducement" and that the salary and the stock did not "form two complementary means of compensation."

At pages 4 and 12 of the brief, reference is made to the letter from Pekovich to Roden, president of the

company, which is set forth at page 70 of the record, and it is stated that Pekovich did not claim that the stock was no longer due Coughlin because of drawing the salary or that the salary was to constitute a substitute for the promise of the stock. We discussed this letter at page 16 of our original brief where we pointed out that it states that it is "very plain the stock has been promised in consideration of the work to be performed," whereas "from the books it shows that Bob (Coughlin) was receiving cash monthly compensation." This certainly shows that Pekovich claimed that Coughlin was not entitled to the stock because he had received cash instead.

Appellee's brief states that Coughlin's predecessor did not regard \$75.00 a month as being adequate for the services. It fails to state that the main reason Ehrendreich gave for not continuing the work was that he had "a busy tax period coming up" (R. 88). At any rate, the same reference shows that Coughlin undertook the work for \$75.00 per month, and he continued it after the first year at the same salary, without any bonus.

Counsel for appellee calls attention to the rule that the judgment of the lower court will not be disturbed on appeal if there is any substantial evidence to sustain it, quoting from *Corpus Juris* and *American Jurisprudence*. But the same authorities also state the converse to the effect that the record will be reviewed when the action of the lower court appears to be clearly erroneous and is manifestly against the weight of the evidence. And it has been held that the reviewing court is not

bound by facts determined in the lower court on uncontradicted or documentary evidence (5 CJS 557-8). In 3 Am. Jur. Sec. 899, pages 463-4, the rule is explained as follows:

“The rule giving great weight in the appellate court to the finding of the trial court on a question of fact lays no restraint on the power of the former to ascertain, by full and complete investigation and analysis of the evidence, what the facts and circumstances are and whether the general finding is consistent therewith, or in other words, whether there is any evidence to sustain the finding. . . . Findings not supported by any competent evidence or which disregard uncontroverted credible evidence, or which are contrary to a conclusion of law resulting from other facts found, cannot be sustained, and a judgment based thereon will be reversed.”

That is the situation which exists here. There is no substantial evidence that the 4000 shares of stock were to be in addition to the salary of \$75.00 a month which Coughlin received. On the contrary, the following facts prove without a doubt that Coughlin was not to receive the stock in addition to a salary of \$75.00 a month:

1. His predecessor received \$75.00 a month;
2. He agreed to do the work for the same salary;
3. Because of lack of funds, he was promised 4000 shares of stock in compensation for his services, which at the prevailing price was the equivalent of \$75.00 a month for one year;
4. When money became available, he took \$75.00 a month instead;
5. After the year was up he continued at \$75.00 a month with no additional compensation;

6. His successor took up the work for the same salary;
7. Coughlin never told Pekovich that he claimed the stock in addition to the salary, and never asked for it (R. 38, 55, 62);
8. The stock was not listed as an asset of his estate.

In view of the fact that the letter promising the shares of stock said they were to be in compensation for the services, we think that the burden of proving that they were to be in addition to the salary of \$75.00 per month is upon appellee, and she has utterly failed to sustain this burden or to offer any evidence upon which such a conclusion can be reached.

The suggestion in appellee's brief that she should be awarded damages for delay is not entitled to consideration and we shall not take the time of the court to discuss it.

We respectfully submit that the opinion of the lower court as expressed during the hearing exactly covers the situation and therefore repeat it here as follows:

“Well, so far, here is what we have. Now let's look at it coldly. We have a company that had ordinarily paid the Secretary-Treasurer for this work and other work the sum of seventy-five dollars per month, according to the testimony. The company was broke when they made this deal with Mr. Coughlin, who had formerly been a vice-president and was very familiar with the situation of the company, so Mr. Pekovich, the defendant herein, wrote this letter. Thereafter, Coughlin, the deceased, drew seventy-five dollars per month. Now, certainly, he can't get both the stock and the money.” (R. 45-6)

Not only was no evidence presented thereafter to justify a change in this opinion, but it was fully supported by competent evidence as above outlined, and we therefore respectfully request that the final decision of the lower court be reversed and that defendants be awarded their costs and disbursements herein, including a reasonable attorney's fee.

Respectfully submitted,

FRED J. WETTRICK

JOSEPH A. MCLEAN

Attorneys for Appellants.

February 13, 1958.

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United States Court of Appeals

For the Ninth Circuit

W. S. PEKOVICH and ADMIRALTY ALASKA
GOLD MINING COMPANY, a Corporation,
Appellants,

vs.

MINNIE COUGHLIN, as Executrix of the
Estate of ROBERT E. COUGHLIN, de-
ceased,
Appellee.

No. 15683

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF
ALASKA, DIVISION NUMBER ONE

PETITION FOR REHEARING (OR RECONSIDERATION)

Appellant petitioner respectfully petitions the Court for reconsideration of the decision rendered and entered herein on the 9th July, 1958, on the ground that the decision is not supported by the evidence and the Court's conclusion is in error.

The petition is based upon the following considerations:

(1) The language of appellant's letter (Tr. 27) Coughlin's contract of employment, states specifically and clearly that for the work of bookkeeper appellant "will give you in compensation *therefor* 4000 shares of stock" The word "therefor" can have no other meaning that *for the work* he is to perform, he will be given the stock; not in lieu of money, not a bonus, but *therefor, i.e.,* in payment for the work as bookkeeper, the same as his predecessor received in cash. The value

of the stock (4,000 shares) was approximately equal to a salary of \$75.00 per month at that time. Nowhere is there any cogent testimony that the stock was in addition to the salary of \$75.00 per month.

(2) The foregoing interpretation is supported by the following:

(a) Coughlin never said a word to appellant that he expected to receive the stock, not even to his friend and predecessor Ehreindrich.

(b) \$75.00 per month or its equivalent in stock was the going salary for that position.

(c) Coughlin paid himself that salary when the funds became available, preferring the cash urgently needed for his family, as shown by the testimony of Mrs. Coughlin (Tr. 137) that they had no principal income for two years. "We spent mostly that we had gotten from the sale of the Peterson Refuge Company and that is what we were living on." Therefore, Coughlin took the cash.

(d) After the year was up, he continued to pay himself \$75.00 per month.

(e) The trial court interpreted the contract letter correctly when the trial judge stated: "Now, certainly he can't get both the stock and the money." (Tr. 45-6)

(f) Appellee, Minnie Coughlin, in submitting to the appraisers the inventory of her husband's estate, August 2nd, 1956 (Tr. 107-11) stated *under oath* in effect that the only stock belonging to the estate was 1,000 shares and made no mention of any 4,000 shares as belonging to the deceased.

(g) Appellant did not "tell Coughlin or anyone else that he (Pekovich) would not deliver the

stock'' (Court's Opinion, p. 2) for the obvious reason that when Coughlin paid himself (he wrote the checks for the Company) his salary in cash for his work, he was fully compensated "*therefor.*"

(h) The stock was not offered "as an added incentive" but in compensation *therefor* as stated clearly and unequivocally in the contract of employment.

(i) The letter or contract is not ambiguous if the word "*therefor*" is given its proper definition; it means in payment *for* the services.

(j) Coughlin had been employed before at \$75.00 per month and accepted the same salary during the tenure of employment in question until his death in September, 1955.

(k) Henry Roden was *President* of the Mining Co., and also a Court appointed appraiser of the Coughlin estate. He verified the inventory of the estate (Ex. E) as covering only 1,000 shares of stock, not 5,000 shares, showing that both Roden, the President of the Company, and the appellee, Executrix of the Coughlin estate, did not consider Coughlin was the potential owner of the 4,000.

(l) Availability of cash funds being doubtful as Coughlin well knew Pekovich agreed "I will give you in compensation *therefor,*" for your services, said shares of stock.

(m) At the second meeting of stockholders (February 7th, 1955) (Tr. 92) one year after Coughlin's employment, at which Coughlin was present, nothing was said by Coughlin about a claim to 4,000 shares of stock, because he had received his salary in cash.

(n) Coughlin worked from February 1st, 1954, to September, 1955, drew his salary in cash and never

once mentioned to Pekovich or the officers of the Company he had 4,000 shares due him.

(o) Letter to Mr. Roden, President of the Mining Co. (Tr. 70) shows plainly that the stocks had been promised in consideration of the work to be performed, "I will give you in compensation *therefor* "

(p) Mrs. Coughlin testified she discussed many times with her husband about the stock (Tr. 129), yet neither she nor Coughlin ever requested of Pekovich delivery of, or even mentioned, the stock, for the obvious reason that Coughlin did not consider the stock due him. The alleged conversation either did not occur, or Coughlin dismissed it from his mind for the reason stated.

We submit that an objective consideration and analysis of the foregoing unmistakably points to the conclusion that the stock in question was promised for the work to be performed, as the word "*therefor*" indicates, and in lieu of cash payment, which was not then available or in immediate prospect, and that when Coughlin later received compensation "*therefor*" in cash he was fully paid. He never expected to be paid twice for the work. Any other interpretation does violence to the language of the contract and totally ignores the use and meaning of the word "*therefor*."

Wherefore, petitioner very respectfully prays that this Court reconsider its decision or grant the privilege of rehearing.

Respectfully submitted,

FRED J. WETTRICK

JOSEPH A. McLEAN

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CERTIFICATE

The undersigned counsel for appellant states that in his judgment the above petition for rehearing is well founded and is not interposed for delay.

FRED J. WETTRICK

of Counsel for Appellant.

